

(26,036)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 569.

TAKAO OZAWA

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print
Certificate from the United States Circuit Court of Appeals for the Ninth Circuit	1	1
Names and addresses of counsel.....	2	1
Statement	3	1
Questions certified	5	2
Judges' signatures	5	3
Clerk's certificate	6	3

1 United States Circuit Court of Appeals for the Ninth Circuit.
No. 2888.

TAKAO OZAWA, Appellant,
vs.

THE UNITED STATES OF AMERICA, Appellee.

Upon Appeal from the United States District Court for the Territory
of Hawaii.

*Certificate of the United States Circuit Court of Appeals for the
Ninth Circuit, Certifying Certain Questions or Propositions of
Law to the Supreme Court of the United States under Section 239
Judicial Code.*

2 Names and Addresses of Attorneys upon This Appeal.

For Petitioner:

David L. Withington, Esq., 125 Merchant St., Honolulu, Hawaii.
J. Lightfoot, Esq., Kapiolani Bldg., Honolulu, Hawaii.

For United States of America:

S. C. Huber, Esq., United States Attorney, Honolulu, Hawaii.
John W. Preston, United States Attorney, San Francisco, Cal.
Ed. F. Jared, Asst. United States Attorney, San Francisco, Cal.

3 In the United States Circuit Court of Appeals for the Ninth
Circuit.

No. 2888.

TAKAO OZAWA, Appellant,
vs.

THE UNITED STATES OF AMERICA, Appellee.

Upon Appeal from the United States District Court for the Territory
of Hawaii.

*Certificate of the United States Circuit Court of Appeals for the
Ninth Circuit, Certifying Certain Questions or Propositions of
Law to the Supreme Court of the United States under Section 239
Judicial Code.*

Before Gilbert, Morrow, and Hunt, Circuit Judges.

This cause came to the Circuit Court of Appeals for the Ninth
Circuit upon an appeal from the United States District Court for the

Territory of Hawaii, from a judgment denying the petition of said Takao Ozawa and refusing him to citizenship and dismissing the petition on the grounds set up by the United States District Attorney for the District of Hawaii.

At the trial of the above entitled cause the petitioner appeared in person, and the petition was opposed by the United States District Attorney for the District of Hawaii on the ground that the petitioner, being a person of the Japanese race and born in Japan, is not eligible to citizenship under Revised Statutes, Section 2169. The other qualifications were proved, including all the statements in the petition, and found to be fully established, and are so conceded by the government. The petitioner had declared his intention to become a citizen of the United States on the first day of August 1902 in Oakland, California, in the Superior Court of the County of Alameda, State of California, and at the time of filing the petition resided, and had so resided at Honolulu, Hawaii, since the 25th day of May 1906. The petition was filed in said Court October 16, 1914.

The applicant had for twenty years continuously resided in the United States, including the last nine years' residence in Hawaii. He graduated from the Berkeley, California, High School, and was for nearly three years a student at the University of California, until it was closed by the earthquake in 1906. He has educated his children in American schools and he and his family have attended American churches, and he has maintained the use of the English language in his home. He presented two briefs of his own authorship, which are ample proof of his qualification, by education and character.

The Court found that the contention of the United States District Attorney is correct and that, although the applicant was eligible for citizenship in every other respect, yet having been born in Japan and being of the Japanese race, as a matter of law he was not eligible to naturalization, and denied the petition, to which the petitioner excepted.

There was heard in this Court at the same time a writ of error taken out by the appellant, Takao Ozawa, to the said judgment and submitted with the appeal.

Questions of law concerning which the Circuit Court of Appeals desires the instruction of the Supreme Court are:

1. Is the Act of June 29, 1906 (34 Stats. at Large, Part 1, Page 596) providing "for a uniform rule for the naturalization of aliens" complete in itself, or is it limited by Section 2169 of the Revised Statutes of the United States.

2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the Naturalization laws?

3. If said Act of June 29, 1906, is limited by said Section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is

one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

WM. B. GILBERT,
ERSKINE M. ROSS,
WILLIAM H. HUNT,
*Judges U. S. Circuit Court of Appeals
for the Ninth Circuit.*

Dated at San Francisco, June 4, 1917.

[Endorsed:] Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under section 239 Judicial Code. Filed June 4, 1917. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

6 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2888.

TAKAO OZAWA, Appellant,

vs.

THE UNITED STATES OF AMERICA, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals for the Ninth Circuit to Copy of Certificate of said Court Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 5 pages, numbered from and including 1 to and including 5, to be a full, true and correct copy of the certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States under Section 239 of the Judicial Code (36 Stat. 1157) filed in the above-entitled cause on the fourth day of June, A. D. 1917, as the original thereof remains on file and appears of record in my office.

Attest my hand the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of June, A. D. 1917.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk,*
By PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed:] No. 2888. United States Circuit Court of Appeals for the Ninth Circuit.

Takao Ozawa vs. The United States of America.

Certified Copy of Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States under Section 239 Judicial Code.

Filed June 4, 1917, F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 26,036. U. S. Circuit Court Appeals, 9th Circuit. Term No. 569. Takao Ozawa vs. The United States. (Certificate.) Filed July 13th, 1917. File No. 26,036.

DEC 9 1922
JAMES D. M.

JAPANESE NATURALIZATION CASE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

NO. [REDACTED]

TAKAO OZAWA

VS.

THE UNITED STATES

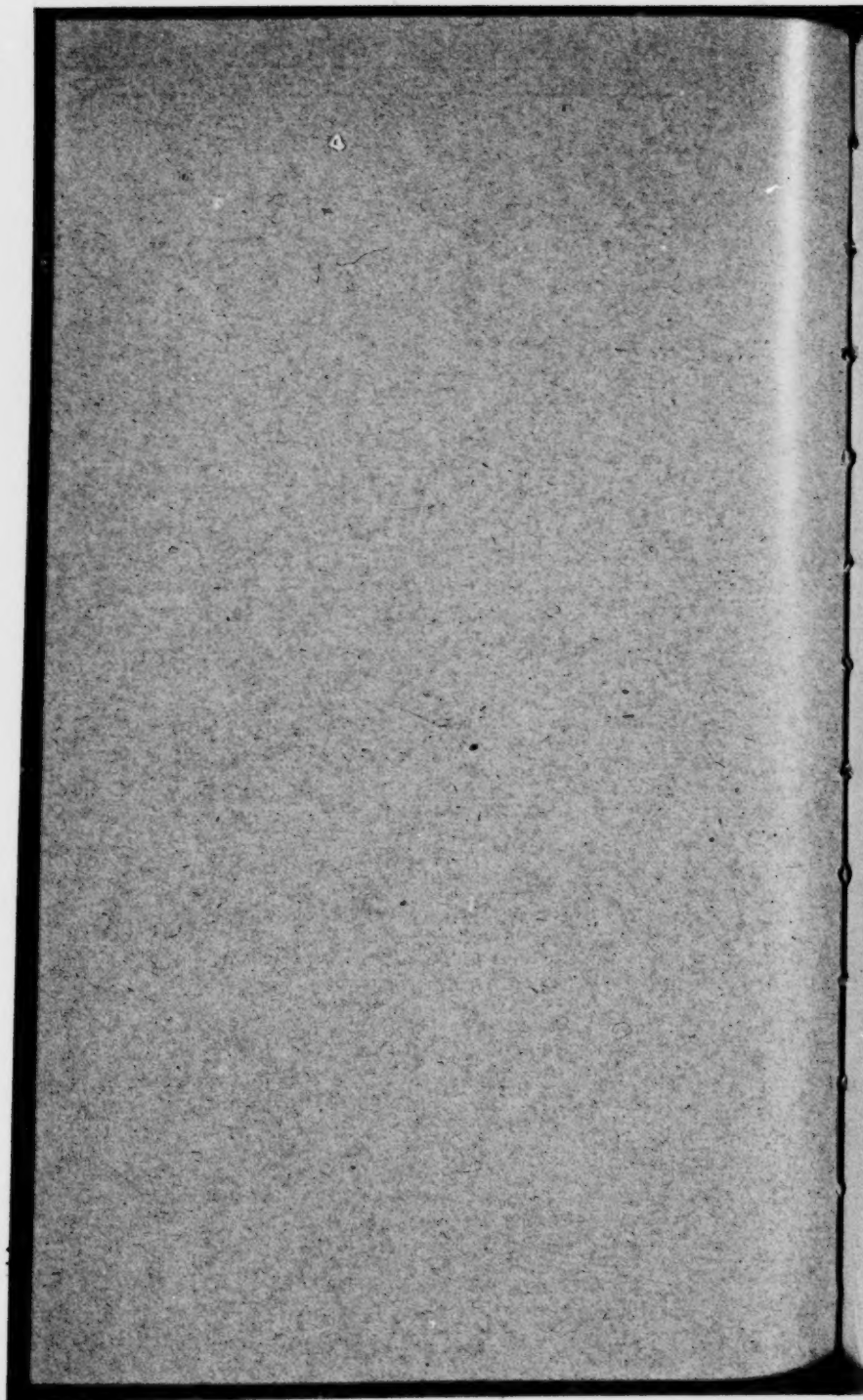
ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

DAVID L. WITHINGTON

For Petitioner.

CASTLE & WITHINGTON,
LIGHTFOOT & LIGHTFOOT,
Of Counsel.



INDEX

	Page
QUESTIONS OF LAW CONCERNING WHICH THE CIRCUIT COURT OF APPEALS DESIRES THE INSTRUCTION OF THIS COURT	3
CANONS OF CONSTRUCTION	4
ARGUMENT	6
I. THE ACT OF JUNE 29, 1906, ESTABLISHED A UNIFORM RULE OF NATURALIZATION, AND THAT RULE IS NOT CONTROLLED OR MODIFIED BY SECTION 2169	6
(a) The constitutional grant of power, the title of the Act, its scope and terms, show that, save in definitely excepted cases, it is a complete, exclusive and uniform rule of naturalization	6
(b) The unrepealed sections of Title XXX and a few other special Acts provide for naturalization in cases excepted from the Uniform Law	11
(1) <i>The decided cases so hold.</i>	11
(2) <i>An examination of these sections confirms this view.</i> ..	13
(c) Section 2169 is not restrictive in terms and if restrictive only applies to Title XXX, Revised Laws, and the cases excepted from the general rule.	15
(1) <i>The history of Section 2169 shows that it was an enlarging and not a restrictive clause.</i>	15
(2) <i>To hold otherwise naturalization from the passage of the Revised Statutes to the Amendatory Act of the 18th day of February, 1875, would be restricted to those of African nativity or descent.</i>	16
(3) <i>The Chinese Exclusion Act of March 6, 1882, supports this view</i>	17
(4) <i>In any event, Section 2169 is applicable only to Title XXX and does not apply to the Act of June 29, 1906</i>	17
(d) The origin of the Uniform Act of June 29, 1906, shows that it was intended to be a complete scheme for naturalization, the test being "fitness for citizenship" with no discrimination against Japanese.	19
(e) This policy announced by President Roosevelt has been steadily followed in legislation in respect both to naturalization and immigration, including the Act of 1917. .	21
(1) <i>These Acts show the traditional policy of the United States to welcome aliens, modified only by restrictions against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race</i>	21

	Page
(2) <i>The immigration Act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization.</i>	27
(f) Any other construction would be violative of the existing treaty with Japan	32
(g) The Act of May 9, 1918, amending the Uniform Naturalization Law of June 29, 1906, tends to support the view that Section 2169 is only restrictive of Title XXX of which it is a part.	33
II. THE POINT THAT SECTION 2169 ENLARGES AND NOT RESTRICTS TITLE XXX OF THE REVISED LAWS, HAS NEVER BEEN ADJUDICATED IN ANY TRUE SENSE, AND THE POINT THAT SECTION 2169 DOES NOT RESTRICT THE UNIFORM ACT OF JUNE 29, 1906, BUT IS CONFINED BY ITS TERMS TO TITLE XXX, HAS NEVER BEEN ADJUDICATED AT ALL	36
(a) No court excepting Judge Lowell, in <i>re Halladjias</i> , has taken into consideration what the section plainly says.	37
(b) No court has ever passed on the point that Section 2169 is confined in terms to Title XXX of the Revised Laws.	39
III. SECTION 2169, IF APPLICABLE TO THE ACT OF JUNE 29, 1906, MUST BE CONSTRUED AS MEANT IN THE ACT OF MARCH 26, 1790, AND, SO CONSTRUED, "FREE WHITE PERSONS" MEANS ONE NOT BLACK, NOT A NEGRO, WHICH DOES NOT EXCLUDE JAPANESE	40
(a) Section 2169, if considered as a reenactment of the earlier law, is to be construed in the light of, and with the meaning of the original Act of March 26, 1790.	41
(b) So construed, the words "free white persons" in the Act of March 26, 1790, mean free whites as distinct from blacks, whether slave or free.	42
(c) "White person," as construed by the Supreme Court of the United States and by the State courts, means a person without negro blood.	43
(d) The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro	50
(e) The insertion by Congress of the word "free" in Section 2169 in 1875, a word which had a definite meaning in 1790, but had no meaning if construed as a new enactment in 1875, shows the intention to reenact the old section with the old meaning.	51

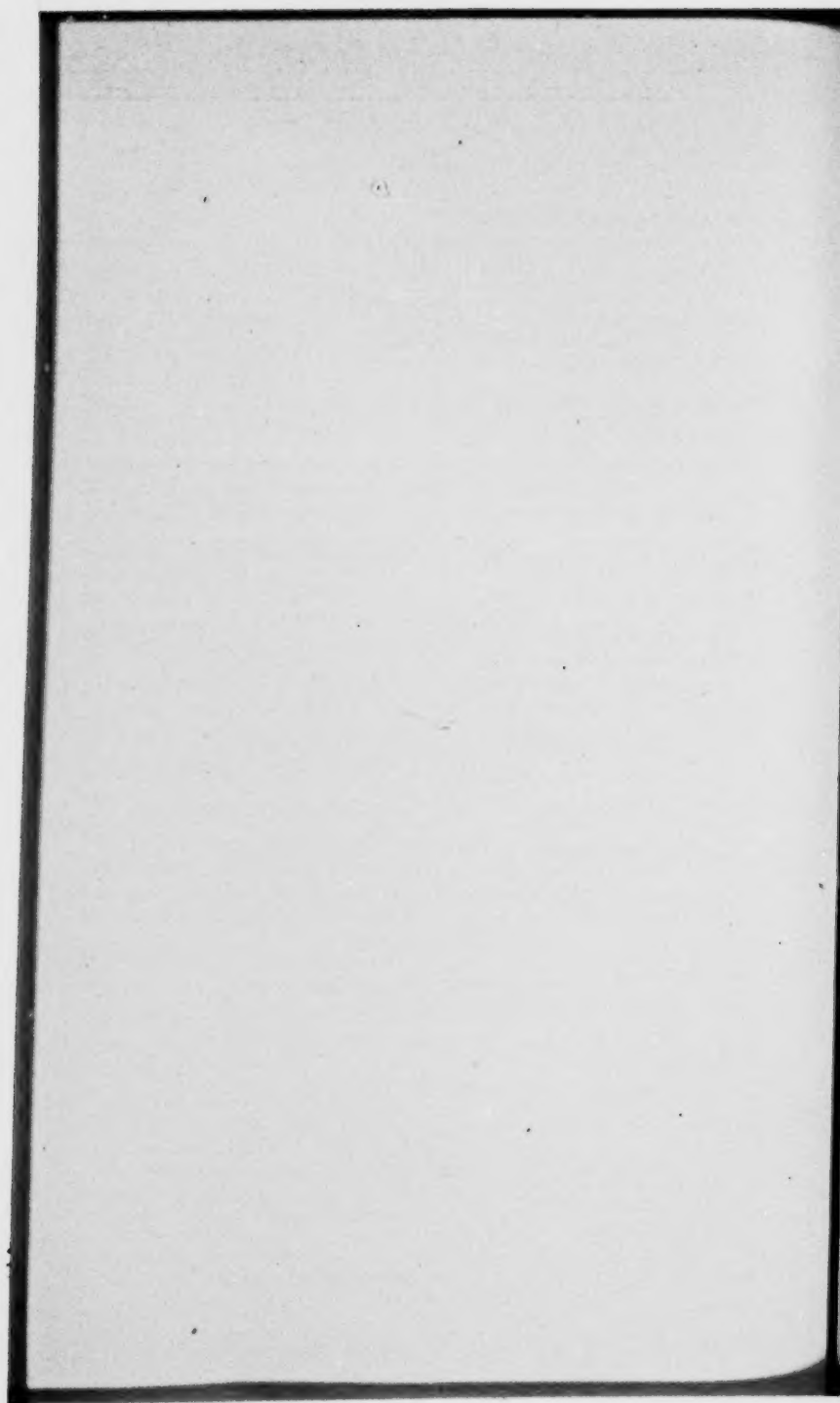
	Page
IV. GIVING THE WORDS "FREE WHITE PERSONS" THEIR COMMON AND POPULAR ACCEPTATION IN 1875, NO "UNIFORM RULE" CAN BE LAID DOWN, BASED ON COLOR, RACE OR LOCALITY OF ORIGIN, AND THERE IS NOTHING IN THE LAWS OF THE UNITED STATES, ITS TREATIES, IN THE HISTORY OF THE TIME, OR THE PROCEEDINGS OF CONGRESS, TO SHOW THAT JAPANESE WERE INTENDED TO BE EXCLUDED.....	52
(a) Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion, and America had recently opened Japan to the western civilization, which Japan was gladly welcoming	53
(b) Judicial construction of the phrase up to 1875 does not sustain such an exclusion.....	53
(c) No "uniform rule," applicable in all cases, can be drawn from the decisions since 1875.....	55
(d) Such exclusion is inconsistent with friendship of America with Japan	59
V. THE WORDS "FREE WHITE PERSONS," NEITHER IN THEIR COMMON AND POPULAR MEANING, NOR IN THEIR SCIENTIFIC DEFINITION, DEFINE A RACE OR RACES OR PRESCRIBE A NATIVITY OR LOCUS OF ORIGIN. THEY DEAL WITH PERSONALITIES AND THE QUALITIES OF PERSONALITIES, AND ARE ONLY SUSCEPTIBLE OF MEANING THOSE PERSONS FIT FOR CITIZENSHIP AND OF THE KIND ADMITTED TO CITIZENSHIP BY THE POLICY OF THE UNITED STATES.....	60
VI. THE QUESTION CERTIFIED IS WHETHER ALL JAPANESE AS A PEOPLE ARE EXCLUDED FROM NATURALIZATION WHICH WOULD EXCLUDE A "PERSON" WHO IS "FREE," WHO IS "WHITE," BECAUSE HE IS A JAPANESE.....	62
VIII. THE JAPANESE ARE "FREE." THEY ARE, OR AT LEAST THE DOMINANT STRAINS ARE "WHITE PERSONS," SPEAKING AN ARYAN TONGUE AND HAVING CAUCASIAN ROOT STOCKS; A SUPERIOR CLASS, FIT FOR CITIZENSHIP.....	62
VIII. THE JAPANESE ARE ASSIMILABLE.....	77
IX. NO RACE BUT THE CHINESE BEING EXCLUDED FROM NATURALIZATION, THE ROOT STOCKS AND THE DOMINANT STRAIN OF THE JAPANESE BEING OF THE WHITE RACE AND BEING "FREE," THE PETITIONER CANNOT BE EXCLUDED ON THE SINGLE GROUND THAT HE IS "ONE OF THE JAPANESE RACE, BORN IN JAPAN"	83
CONCLUSION	84

CASES CITED

	Page
Ah Yup, re, 5 Sawy. 155.....	17, 26, 55
Akhay Kumar Mozumdar, In re, 237 Fed. 115.....	56
Alveto, In re, 198 Fed. 688.....	40, 56
Attorney General, 24 Opinions.....	24
Besaho v. United States, 178 Fed. 245.....	9, 39, 49, 57
Boyd v. Nebraska, 143 U. S. 135.....	6
Brefo, In re, 217 Fed. 131.....	8
Buntaro Kumagai, In re, 163 Fed. 922.....	12, 57
Camille, In re, 6 Fed. 256.....	17, 56
Century Dictionary	50
Chirac v. Chirac, 2 Wheat. 259.....	6
Crenshaw v. United States, 134 U. S. 99.....	41
Dow, In re, 213 Fed. 355.....	24, 42, 56
Dow v. United States, 226 Fed. 145.....	42, 56
Dred Scott v. Sandford, 19 Haw. 393.....	6, 49, 53
Durousseau v. United States, 6 Cranch 307.....	7, 48
Du Val v. Johnson, 39 Ark. 182.....	49, 53
Enc. Brit., vol. 2, p. 113.....	63
Enc. Brit., vol. 9, p. 851.....	63
Enc. Brit., vol. 11, p. 635.....	64
Fong Yue Ting v. United States, 149 U. S. 698.....	22
Gee Hop, In re, 71 Fed. 274.....	26
Halladjian, In re, 174 Fed. 834.....	38, 48
Hamilton v. Rathbone, 175 U. S. 414.....	41
Hampden County v. Morris, 207 Mass. 167, 93 N. E. 579.....	10
Hong Yen Chang, In re, 84 Cal. 163.....	55
Johannessen v. United States, 225 U. S. 227.....	6
Kanaka Nian, In re, 6 Utah 259, 21 Pac. 993.....	58
Kang-Gi-Shun-Ca, In the matter of, 109 U. S. 556.....	41
Kent's Commentaries, vol. 2, p. 72.....	55
Knight, In re, 171 Fed. 299.....	58
Lapina v. Williams, 232 U. S. 78.....	25, 38
Leichtag, In re, 211 Fed. 681.....	10, 12
Loftus, In re, 165 Fed. 1002.....	12
Low Wah Sney v. Backus, 225 U. S. 460.....	55
Luria v. United States, 231 U. S. 9.....	6
Lynch v. Clarke, 1 Sandf. 583.....	53, 58
Mallari, In re, 239 Fed. 416.....	10
McDonald v. Hovey, 110 U. S. 619.....	41

v

	Page
McNabb, In re, 175 Fed. 511.....	12
Mudarri, In re, 176 Fed. 465.....	57
New Standard Dictionary.....	50
Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184....	38
People v. Elyea, 14 Cal. 145.....	54
People v. Hall, 4 Cal. 399.....	54
Ratzel's History of Mankind, vol. 3, p. 454.....	66
Rodriguez, In re, 81 Fed. 337.....	58
Saito, In re, 62 Fed. 126.....	57, 58
San C. Po. In re, 28 N. Y. Supp. 383.....	55
Shahid, Ex parte, 205 Fed. 812.....	41, 56
Standard Dictionary	50
Sterbuck, In re, 224 Fed. 1012.....	12
Tancred, In re, 227 Fed. 329.....	12
United States v. Balsara, 180 Fed. 694.....	39, 40, 56
United States v. Crook, 25 Fed. Cas. 695.....	61
United States v. Ginsberg, 243 U. S. 472.....	10
United States v. LeBris, 121 U. S. 278.....	41
United States v. Lengyel, 220 Fed. 720.....	12
United States v. Meyer, 170 Fed. 983.....	12
United States v. Ness, 245 U. S. 319.....	10
United States v. Perryman, 100 U. S. 235.....	48
United States v. Peterson, 182 Fed. 289.....	11
United States v. Rodiek, 162 Fed. 469.....	9
United States v. Ryder, 110 U. S. 729.....	41
United States v. Wong Kim Ark, 169 U. S. 649.....	6, 8
United States v. Wong You, 223 U. S. 67.....	24
Webster's Dictionary	50
Webster's New International Dictionary.....	51
Wong Wing v. United States, 163 U. S. 235.....	61
Yamashita, In re, 30 Wash. 234, 70 Pac. 482.....	58
Yamataga v. Fisher, 189 U. S. 86.....	33
Y. Wo v. Hopkins, 118 U. S. 369.....	61



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 222

TAKAO OZAWA

v.

THE UNITED STATES.

*On a Certificate from
the United States Cir-
cuit Court of Appeals
for the Ninth Circuit.*

BRIEF FOR PETITIONER.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Ninth Circuit, the case having come to that court, both on appeal and by writ of error, from a judgment denying the petition of said Takao Ozawa for citizenship.

At the trial in the United States District Court of Hawaii the United States District Attorney opposed the petition because Takao Ozawa, the petitioner, was of the Japanese race and born in Japan, and not eligible to citizenship under Revised Statutes, Section 2169. The other qualifications were proved, found to be fully established, and conceded by the Government. The certificate continues:

"The applicant had for twenty years continuously resided in the United States, including the last nine years' residence in Hawaii. He graduated from the Berkeley, California, High School, and was for nearly three years a student at the University of California, until it was closed by the earthquake in 1906. He has educated his children in American schools and he and his family have attended American churches, and he has maintained the use of the English language in his home. He presented two briefs of his own authorship, which are ample proof of his qualification, by education and character.

"The court found that the contention of the United States District Attorney is correct and that, although the applicant was eligible for citizenship in every other respect, yet having been born in Japan and being of the Japanese race, as a matter of law he was not eligible to naturalization, and denied the petition, to which petitioner excepted."

**QUESTIONS OF LAW CONCERNING
WHICH THE CIRCUIT COURT OF AP-
PEALS DESIRES THE INSTRUCTION OF
THIS COURT.**

1.

Is the Act of June 29, 1906 (34 Stat. at Large, Part 1, page 596), providing "for a uniform rule for the naturalization of aliens," complete in itself, or is it limited by Section 2169 of the Revised Statutes of the United States?

2.

Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?

3.

If said Act of June 29, 1906, is limited by said Section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

These questions really are two in number, and restated are:

1. Is the Act of June 29, 1906, complete in itself, and does it provide what it declares, "a uniform rule for the naturalization of aliens"?

2. If the Act of June 29, 1906, is limited by Section 2169 so that naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, *under any circumstances* eligible to naturalization?

CANONS OF CONSTRUCTION.

The solution of the questions certified to this court is, we apprehend, governed by:

1. The constitutional direction to Congress to establish an uniform rule of naturalization, and the coordinate public duty to enact plain and adequate legislation to carry out this provision.

2. The course of legislation. What Congress has done to establish this uniform rule.

3. The general scope of that legislation, and the declared policy of the United States in converting aliens into citizens, involving the whole field of legislation in reference to immigration as well as naturalization, and the ascertainment of the class of aliens Congress has determined to be fit for citizenship.

4. Does the Act of June 29, 1906, establish a uniform rule of naturalization and is it complete in itself?

5. Where a statute which has had an accepted meaning is reenacted, should words of the reenacted statute be taken in their hitherto accepted sense?

6. In determining whether words are to receive the accepted sense of the original enactment, or their

meaning at the time when reenacted, is the fact that the words, taken in the latter sense, have no definite meaning, and that in judicial construction none has been found, persuasive that the meaning attached to them under the original enactment must be given.

7. Where the reenactment purports to be a correction of an error in omitting the original enactment in a revision is this a further consideration for giving to the words their meaning at the time when originally enacted?

8. Should opinions of courts of inferior jurisdiction, although many in number, giving new constructions to the language of the reenactment, be persuasive with the court, when based on no uniform rule, furnishing no common test, the rules in some cases based on race, in others on locality of origin, which test of locality and of race varies with the court, in determining a provision of law which deals simply with persons and with color, excepting so far as it applies to persons of African nativity and descent?

9. It should be assumed that Congress, in dealing with the great boon of citizenship in this land of the free and refuge of the oppressed, was frank and outspoken in its legislation and not sidestepping any difficulty or legislating by indirection where it feared to legislate directly.

10. The fact that the Japanese are a free people, that their root stock, like that of the Polynesian, is of the white race and that while Mongolian and Malay types are found amongst the Japanese, the Caucasian or white type is as prevalent.

11. The question is not whether some or most of the Japanese can not be naturalized, but whether all Japanese even if of the Caucasian or white race can not be naturalized.

ARGUMENT.

I.

The Act of June 29, 1906, establishes a Uniform Rule of Naturalization, and that rule is not controlled or modified by Section 2169.

(a) THE CONSTITUTIONAL GRANT OF POWER, THE TITLE OF THE ACT, ITS SCOPE AND TERMS, SHOW THAT, SAVE IN DEFINITELY EXCEPTED CASES, IT IS A COMPLETE, EXCLUSIVE AND UNIFORM RULE OF NATURALIZATION.

Article I, Section 8, of the Constitution of the United States provides:

"The Congress shall have Power * * *

"To establish an uniform Rule of Naturalization
* * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *"

Chirac v. Chirac, 2 Wheat. 259.

Dred Scott v. Sanford, 19 How. 393.

Boyd v. Nebraska, 143 U. S. 135.

United States v. Wong Kim Ark, 169 U. S. 649.

Johannessen v. United States, 225 U. S. 227.

Luria v. United States, 231 U. S. 9.

Congress exercised this power in the first Congress, in the second session, and passed the Act of March 26, 1790 (1 Stat. L. 103), entitled:

"An Act to establish an uniform rule of naturalization."

This Act was repealed by a like Act with a like title in 1795, and that by the Act of April 14, 1802 (2 Stat. L. 153), which in turn was entitled:

"An Act to establish an uniform rule of naturalization."

This in turn became Title XXX of the Revised Statutes of the United States, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled:

"An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

This court has said in construing an Act defining its jurisdiction, which is derived from the Constitution:

"The Constitution and the laws are to be construed together."

Durousseau v. United States, 6 Cranch 307.

And of this very power this court said in the Wong Kim Ark case:

"The simple power of the national legislature is to

prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as it respects the individual."

United States v. Wong Kim Ark, ubi supra, p. 703.

This Act purports to be a complete Act. It provides in Section 3 for exclusive jurisdiction of naturalizing aliens, and in Section 4,

"that an alien may be admitted to become a citizen of the United States in the following manner, and *not otherwise*,"

followed by five paragraphs prescribing the conditions of admission, among which, in paragraph two, that the petition shall set forth

"every fact material to his naturalization and required to be proved upon the final hearing of his application."

In Section 27 the form of this petition is given, containing the allegations which Congress believed were "material to his naturalization and required to be proved," but nothing with reference to color or race.

The intent of Congress to enact a uniform rule, and that it had enacted a uniform rule, for naturalization, covering the entire subject and even giving to the rules and regulations the force of law, is clear.

In re Brefo, 217 Fed. 131.

In a case in which it is held that the special provision as to naturalization in the Organic Act of the Territory of Hawaii (Act of April 30, 1900) was

inconsistent with Section 4 of the Act of June 29, 1906, and therefore repealed, the court say:

"The title of the Act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. * * * There is no reason to presume that in enacting the later statute Congress intended to make any special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the United States. There was no reason for bestowing special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States."

United States v. Rodiek, 162 Fed. 469.

It is interesting to note that Judge Gilbert in this case speaks of Section 2169 (unrepealed) as a section "which extends the privilege of naturalization to aliens of African nativity and to persons of African descent."

"By this legislation a new and complete system of naturalization was adopted, all of the details of which, together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed."

Bessho v. United States, 178 Fed. 245.

In a case holding that Section 2166 was not repealed it was said:

"The Act of June 29, 1906, 34 St. at Large 596, commonly called the "Naturalization Law," was in-

tended to provide a uniform system for the naturalization of aliens."

In re Leichtag, 211 Fed. 681.

"The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization."

In re Mallari, 239 Fed. 416.

Hampden County vs. Morris, 207 Mass. 167, 93 N.E. 579; *Ann. Cases* 1912A, 815.

"Prior to 1906 'the Uniform Rule of Naturalization' authorized by the Constitution was found in the Act of 1802 (2 Stat. at L. 153, chap. 28), and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook, by the Act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, Comp. Stat. 1913, sec. 963), to prescribe 'and fix a uniform system and a code of procedure in naturalization matters.' Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906."

United States v. Ginsberg, 243 U. S. 472.

This case was cited in a recent case in which the court held that a certificate of naturalization issued without filing the certificate of arrival as provided in Section 4, Subdivision 2, of the Uniform Act of June 29, 1906, was invalid, the court saying:

"A 'uniform rule of naturalization' embodied in a simple and comprehensive code under Federal supervision was believed to be the only effective remedy for then-existing abuses. And in view of the large number of courts to which naturalization of aliens was intrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the Code prescribed also the exact character of proof to be adduced."

United States v. Ness, 245 U. S. 319.

"The language there employed is comprehensive and emphatic. A 'uniform rule' is provided. 'An alien' may be admitted to citizenship in the manner prescribed, 'and not otherwise.'

"A wise public policy undoubtedly inspired the enactment of this law. Its intent, gathered from the unambiguous language employed, subjects all aliens to a public, drastic, and thorough examination touching their qualifications for citizenship before that priceless boon is conferred upon them. It is not our province to thwart this public policy by reading unwarranted or doubtful exceptions into the act."

United States v. Peterson, 182 Fed. 289, 291.

To recapitulate, the Constitution grants to Congress the power "*To establish an uniform Rule of Naturalization.*" The various Acts of Congress which have exercised this power from the Act of the first Congress, March 26, 1790, have been and have purported to be Acts "*To establish an uniform Rule of Naturalization.*" The Act of June 29, 1906, purports to be an exercise of the power granted by the Constitution, and purports to be an exhaustive exercise of that power and is complete in itself.

(b) THE UNREPEALED SECTIONS OF TITLE XXX AND A FEW OTHER SPECIAL ACTS PROVIDE FOR NATURALIZATION IN CASES EXCEPTED FROM THE UNIFORM LAW.

(1) *The decided cases so hold.*

Dealing hereafter with the effect of the Act of May 9, 1918, we observe that Section 26, the repeal-

ing clause of the Act of June 29, 1906, does not specifically repeal Sections 2166, 2169, 2170, 2171, 2172 and 2174 of Title XXX, and it has been uniformly held, although the application of the rule is not uniform, that while the Act of 1906 is a general act, as it did not repeal specific sections of Title XXX regulating the admission of special classes singled out for favor, the unrepealed portion stands covering these special cases.

In re Buntaro Kumagai, 163 Fed. 922.

In re Loftus, 165 Fed. 1002.

United States v. Meyer, 170 Fed. 983.

In re McNabb, 175 Fed. 511.

In re Leichtag, ubi supra.

United States v. Lengyel, 220 Fed. 720.

In re Sterbuck, 224 Fed. 1013.

In re Tancrel, 227 Fed. 329.

"Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary were not required. This would be natural as to applicants who had actually been in the service of the United States and as to whose good character the officers of the United States had certified."

In re Loftus, ubi supra.

(2) *An examination of these sections confirms this view.*

Section 2166, a reenactment of the Act of July 17, 1862, passed during the Civil War, provides for the naturalization of honorably discharged soldiers without previous declaration and with but one year's residence, instead of five provided by existing law.

There is a similar provision originally part of the Naval Appropriation Act of July 26, 1894, Chapter 165, 28 Stat. L. 124, revised in the Naval Appropriation Act of June 30, 1914, Chapter 130, 38 Stat. L. 395), providing for the naturalization of aliens who have served an enlistment in the United States Navy or Marine Corps, and have received an honorable discharge or an ordinary discharge with recommendation for reenlistment, without previous declaration of intention, and by the latter act without proof of residence on shore, the honorable discharge or discharge with recommendation for reenlistment to be accepted as proof of good moral character, the service under the Act of 1894 being for five years and that under the Act of 1914 for four years.

Section 2169, under discussion, is specifically limited in its application to Title XXX, of which it is a part.

Section 2170, not expressly repealed either by the Act of June 29, 1906, or by the Act of May 9, 1918, is *functus officio*, as its provisions are covered by the fourth paragraph of Section 4 of the former Act, and its requirement of residence for five years is incon-

sistent with Section 2166 above referred to and Section 2174, authorizing the admission, as citizens, or seamen having served three years on board a merchant vessel, providing that such seamen after declaration of intention and three years' service shall be deemed citizens and for the purpose of manning merchant vessels and after the declaration, be deemed American citizens for the purpose of protection.

Section 2171 is a hoary relic forbidding the naturalization of alien enemies, with reservations for those who had made declarations before the 18th day of June, 1812, or were entitled to become citizens without declaration, and the further proviso reserving the right to apprehend and remove alien enemies.

The remaining section, 2172, naturalizes the minor children of persons duly naturalized without restriction as to residence and contains a further hoary provision against those legally convicted of joining the army of Great Britain during the Revolutionary War, and another provision making children of citizens, though born out of the United States, citizens.

When the questions were certified to this court, Title XXX applied to the Army, Navy, including the Marine Corps, to alien enemies, the children of persons naturalized and to seamen.

(c) SECTION 2169 IS NOT RESTRICTIVE IN TERMS AND IF RESTRICTIVE ONLY APPLIES TO TITLE XXX, REVISED LAWS AND THE CASES EXCEPTED FROM THE GENERAL RULE.

(1) *The history of Section 2169 shows that it was an enlarging and not a restrictive clause.*

The Act of July 14, 1870 (16 Stat. L. 256, ch. 254), declares:

"The naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

When the Revised Statutes were enacted, the words of the existing naturalization statute, Act of April 14, 1802, were:

"That any alien, being a free white person, may be admitted to become a citizen."

modified when incorporated in Section 2165 so as to read:

"Section 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise."

and the Act of July 14, 1870, was incorporated as a separate section, viz:

"Section 2169. The provisions of this Title shall apply to aliens of African nativity and to persons of African descent."

When the Act to Correct Errors in the Revised

Statutes (Stat. 1875, c. 18, v. 18, p. 318) was passed, attention was called to the omission of the words "being free white persons" in Section 2165, but instead of reinserting them in that section, Section 2169 was amended to read as follows:

"Section 2169. The provisions of this Title shall apply to aliens (being free white persons and to aliens) of African nativity and to persons of African descent."

Section 2169 as originally enacted is an enlarging and not a restrictive declaration, and the introduction of the words "being free white persons and to aliens" does not change the provision from an enlarging to a restrictive one. There is nothing in the language used to show the intention of Congress to *restrict* naturalization to free white persons and Africans by this amendment. This inference, for it is nothing but an inference, is drawn entirely from the previous history of legislation and declarations on the floor of Congress, the uniform rule having previously provided only for the naturalization of "any alien being a free white person."

(2) *To hold otherwise naturalization from the passage of the Revised Statutes to the Amendatory Act of the 18th day of February, 1875, would be restricted to those of African nativity or descent.*

If Section 2169 is restrictive then as originally enacted in the Revised Statutes it was restrictive and naturalization until the passage of the Act to correct errors was restricted to those of African nativity or descent, which is incredible.

(3) *The Chinese Exclusion Act of March 6, 1882, supports this view.*

Congress evidently took this view that the words were not restrictive and that affirmative legislation was necessary to exclude the Chinese from citizenship, for it passed the Act of May 6, 1882, which provides:

"Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and *all laws in conflict with this act are hereby repealed.*"

This after it had been held that the language of Section 2169 excluded the Chinese.

In re Ah Yup (1878), 5 Sawy. 155.

And a half Indian.

In re Camille (1880), 6 Fed. 256.

(4) *In any event, Section 2169 is applicable only to Title XXX and does not apply to the Act of June 29, 1906.*

It is not necessary to rest the argument on the ground just discussed, for Section 2169 is made applicable in terms only to Title XXX, of which the Act of June 29, 1906, is not a part.

To hold that Section 2169 is a restriction on the Act of June 29, 1906, which provides for a "uniform rule for the naturalization of aliens," requires not only the inference of a prohibition of the naturalization of other than free white persons and those of African nativity or descent from words which con-

tain no such prohibition, but also making a section which declares that "*the provisions of this Title shall apply*" to a restricted class of aliens, declare that *the provisions of the Act of June 29, 1906*, shall apply only to the same restricted class of aliens; not only converts that which is in terms an extension of the meaning of the Act into a restriction, but also incorporates into a general law, purporting to contain the entire uniform rule for naturalization, a provision which is in, and restricted in terms to, a title in another Act, which Act and which title have not been repealed. The more reasonable supposition is that Congress intended to retain Section 2169 as a limitation on the specially excepted classes provided for in the unrepealed sections in Title XXX, and that the general rule provided for in the Act of June 29, 1906, applied to all other aliens and was not to be restricted, excepting as provided in that Act. These conclusions, drawn from the general scope of the Act, are reinforced by the express language of the Act of June 29, 1906, which declares, in the terms used in the previous general Acts, omitting the words "being a free white person."

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and *not otherwise*."

and then prescribes *all* the conditions of admission and provides for a petition setting forth "*every fact material to his naturalization and required to be proved*," this form given for the petition containing no fact to show that the applicant is a free white per-

son or that he is of African nativity or African descent.

(d) THE ORIGIN OF THE UNIFORM ACT OF JUNE 29, 1906, SHOWS THAT IT WAS INTENDED TO BE A COMPLETE SCHEME FOR NATURALIZATION, THE TEST BEING "FITNESS FOR CITIZENSHIP" WITH NO DISCRIMINATION AGAINST JAPANESE.

The initiatory step in the legislation was an executive order issued in March, 1905, appointing a Commission composed of an officer from the Department of State, Gaillard Hunt, from that of Justice, M. D. Purdy, and from Commerce and Labor, Richard K. Campbell, who submitted a report transmitted to the 59th Congress by President Roosevelt, who, in his annual message at the opening of the session, December 5, 1905, announced the appointment and referred to this Commission and called attention to the recommendation "as to the importance of revising by appropriate legislation our system of naturalizing aliens." (Congressional Record, Vol. 40, Part 1, p. 99.) The same message also dealt with the subject of immigration, the President saying:

"The prime need is to keep out all immigrants who will not make good American citizens."

and again:

"In dealing with this question it is unwise to depart from the old American tradition and to discriminate for or against any man who desires to

come here and become a citizen, save on the ground of that man's *fitness for citizenship*. It is our right and duty to consider his moral and social quality. His standard of living should be such that he will not, by pressure of competition, lower the standard of living of our own wage-workers; for it must ever be a prime object of our legislation to keep high their standard of living. If the man who seeks to come here is from the moral and social standpoint of such a character as to bid fair to add value to the community he should be heartily welcomed. We can not afford to pay heed to whether he is of one creed or another, of one nation or another. We can not afford to consider whether he is Catholic or Protestant; Jew or Gentile; whether he is Englishman or Irishman, Frenchman or German, *Japanese*, Italian, Scandinavian, Slav, or Magyar. What we should desire to find out is the individual man. In my judgment, with this end in view, we shall have to prepare through our own agents a far more rigid inspection in the countries from which the immigrants come. It will be a great deal better to have fewer immigrants, but all of the right kind, than a great number of immigrants, many of whom are necessarily of the wrong kind. As far as possible we wish to limit the immigration to this country to persons who propose to become citizens of this country, and we can well afford to insist upon adequate scrutiny of the character of those who are thus proposed for future citizenship" (p. 101).

and again:

"The questions arising in connection with Chinese immigration stand by themselves" (p. 101).

It will be observed that in this message, while the subject of Chinese immigration is dealt with at length and is said to stand by itself, it is expressly declared that there should be no restriction on *Jap-*

anese immigration and that immigration should be limited as far as possible to future citizens, and the immigration restricted and scrutinized, with this requirement in view. In the proceedings in Congress there is no indication that Japanese were to be discriminated against either as to immigration or citizenship.

(e) THIS POLICY ANNOUNCED BY PRESIDENT ROOSEVELT HAS BEEN STEADILY FOLLOWED IN LEGISLATION IN RESPECT BOTH TO NATURALIZATION AND IMMIGRATION INCLUDING THE ACT OF 1917.

These Acts show that the policy of Congress is to exclude undesirable citizens and the Chinese and that Congress has refrained with great care from any action tending to place Japanese in the same class with Chinese.

(1) *These Acts show the traditional policy of the United States to welcome aliens, modified only by restrictions against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race.*

Immigration precedes naturalization in natural and logical order. The same reasons which tend to restrict one operate on the other.

Up to the adoption of the Revised Statutes, by treaties and statutes, the immigration of aliens had been encouraged; the alien Act of June 25, 1798, the

one exception, was largely instrumental in sweeping the Federals from office and bringing in the Republican administration of Jefferson. That Act "has ever since been the subject of universal condemnation" (Mr. Justice Field in *Fong Yue Ting v. United States*, 149 U. S. 868).

Since the Revised Laws, various Acts have limited immigration, culminating in the Act of February 5, 1917. The earliest, that of March 3, 1875 (18 Stat. L., p. 477), is a limitation on the importation of women for immoral purposes, the supplying of coolie labor, and the entrance of alien persons under sentence for felonious crimes other than political.

By Act of August 3, 1882 (22 Stat. L., p. 214), convicts, lunatics, idiots or persons unable to take care of themselves were forbidden admission.

By Act of February 26, 1885 (23 Stat. L., p. 332), amended February 23, 1887 (24 Stat. L., p. 414), Congress reversed the policy of the United States, initiated by President Lincoln during the war, and prohibited the introduction of contract labor.

By Act of March 3, 1891 (26 Stat. L., p. 1084), there were added to the prohibited classes, paupers, persons suffering from a loathsome or dangerous contagious disease, and persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also assisted immigrants.

By Act of March 3, 1903 (32 Stat. L., p. 1213), there were added epileptics, persons who had been insane within five years or who had had two or more

attacks, professional beggars, anarchists, prostitutes, procurers, and those previously deported.

A comparison with the requirements in the Act of June 29, 1906, shows that Congress excluded from naturalization the same classes denied admission under the immigration law, with the exception of those suffering from physical infirmities, requirements against physical infirmities acquired in this country not being applicable to naturalization.

An examination of the laws in regard to race exclusion shows that numerous Chinese exclusion Acts have been passed: May 6, 1882 (22 Stat. L., p. 58), July 5, 1884 (23 Stat. L., p. 115), October 1, 1888 (25 Stat. L., p. 504), September 13, 1888 (25 Stat. L., p. 476), May 5, 1892 (27 Stat. L., p. 25), November 3, 1893 (28 Stat. L., p. 7), June 6, 1900 (31 Stat. L., p. 588), March 3, 1901 (31 Stat. L., p. 1093), April 29, 1902 (32 Stat. L., p. 176), and April 27, 1904 (33 Stat. L., p. 394). The two latter Acts extend exclusion to the island territory under the jurisdiction of the United States, but do not forbid the passage from one island to another, and provide for Chinese laborers, other than citizens, obtaining a certificate elsewhere than in Hawaii. In none of these laws is there any reference to any other nationality than Chinese. To these can be added April 28, 1904 (33 Stat. L., 478), and June 23, 1913 (38 Stat. L., 4).

In Hawaii, by the joint resolution of July 7, 1898 (30 Stat. L., p. 751), further immigration of Chinese into the Hawaiian Islands was prohibited, and no

Chinese was allowed to enter the United States from the Hawaiian Islands; and by the Organic Act of April 30, 1900 (31 Stat. L., p. 141), the Chinese were required to procure certificates under the Act of May 5, 1892.

The Act of March 3, 1891, committed to the Commissioner General the enforcement of the Chinese exclusion Act, while the Act of March 3, 1893, provided that it should not apply to Chinese persons, and the 36th section of the Act of March 3, 1903, contains this provision:

"Provided, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration, or exclusion of Chinese persons or persons of Chinese descent."

Inserted in order to preserve those laws from repeal (24 Op. Atty.-Gen. 706).

"The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."

United States v. Wong You, 223 U. S. 67.

In re Dow, 213 Fed. 355.

Against this long line of statutes we place the fact that there is no line in any statute before or since 1875 which indicates any intention on the part of Congress to put the Japanese into the class with immoral, insane and other undesirable immigrants, or to class the Japanese with the Chinese or to discriminate against the Japanese in any way. We have traced the course of legislation along these two

parallel lines and endeavored to show that the legislative mind ran in the same course, with no trace of intention to exclude the Japanese from admission or from naturalization.

The apparent exception in the Acts forbidding the importation of coolies (R. S., Sec. 2158 to 2163), originally enacted February 19, 1862 (12 Stat. L., 340), and the Supplemental Act of March 3, 1875 (18 Stat. L., 477), are but a prelude to the contract labor legislation beginning with the statute of February 26, 1885, and now found in the general Immigration Act of February 24, 1907 (34 Stat. L., 898), making it a misdemeanor to import contract labor, which covers the ground of all the earlier Acts.

This court in a recent case, in reviewing the history of the immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers) who are undesirable as members of the community, even if previously domiciled in the United States.

Lapina v. Williams, 232 U. S. 78.

"That congress has never contemplated or intended to confer the right of naturalization upon Mongolians, or natives of China, is palpable by a mere reference to the laws upon the subject of naturalization. Section 2169 of the Revised Statutes, under the title 'Naturalization,' reads:

"The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent."

"Mongolians, or persons belonging to the Chinese

race, are not included in this act. This was the view held by Judge Sawyer, sitting on the circuit bench for this circuit (Ninth), *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104, where the subject was very learnedly and elaborately discussed and considered. He says, in summing up his conclusions:

"Thus, whatever latitudinarian construction might otherwise have been given to the term 'white person,' it is entirely clear that congress intended, by this legislation, to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of Congress.'"

"But if there could be any question as to the meaning of the provision above referred to with reference to Mongolians, the matter is settled and concluded by the imperative and unmistakable language of the act of congress of May 6, 1882, which says:

"'Hereafter no state court or court of the United States shall admit Chinese to citizenship.'

"That such is the law of the land and the policy of this country is explicitly recognized by article 4 of the convention between the United States of America and the empire of China, which was duly signed and ratified, and, on December 8, 1894, proclaimed by the president. This article provides:

"'In pursuance of article 3 of the immigration treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghsii, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* * * *"

In re Gee Hop, 71 Fed. 274-275.

(2) *The immigration Act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization.*

The immigration Act of February 5, 1917, and the discussion of the bill in Congress show no intention of placing the Japanese in a class with the Chinese. Japan is expressly excepted from its provisions by a territorial limitation, done in deference to the Japanese Government. (See correspondence between Senator Phelan and Secretary of Labor Wilson, Congressional Record, December 13, 1916, p. 266.) As it came from the House, that bill, while making some small changes in excluded persons, particularly those afflicted with tuberculosis, was chiefly marked by two additional grounds of exclusion: one, the provision for which three presidents of the United States had vetoed similar Acts,—the requirement that aliens over sixteen years of age, physically capable of reading, unable to read the English language or some other language or dialect, should be excluded, which finally became the law over the veto of President Wilson; the other, the inclusion in the excluded classes of:

“Hindus and persons who can not become eligible, under existing law, to become citizens of the United States by naturalization, unless otherwise provided for by existing agreements as to passports, or by existing treaties, conventions, or agreements or by treaties, conventions, or agreements that may here-

after be entered into." (Congressional Record, p. 164.)

To this clause the Japanese Government objected, and the State Department requested the bill to be amended (Congressional Record, Dec. 11, 1916, p. 165; and p. 235, Senator Lodge), and the bill was amended as follows:

"* * * unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia, situate south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States." [Sec. 3.]

Numerous amendments were offered to this clause. The southern senators endeavored to exclude immigration of Negroes, particularly from the West Indies; the members from the Pacific coast to exclude the Orientals. All amendments were voted down, the west not voting with the south on the Negro, and the south not voting with the west on the Asiatic.

There are frequent tributes in the debate to the

Japanese nation; among others that Japan has control of the Pacific Ocean, is a great naval and military power. (Senator Gallinger, p. 285.)

"As a matter of fact, I believe that Japan is one of the most efficient as well as one of the most powerful of nations. I recognize her great intelligence, I recognize her great efficiency in whatever walk of industrial life they seek to enter." (Senator Chamberlain, p. 226.)

"I have never claimed, neither do the people of the Pacific coast claim, that the Japanese are an inferior race." (Senator Works, p. 228.)

"The Japanese feel that they are equal; in fact, they feel that they are our superiors, and in many respects they are. They are able, fit, thrifty, and shrewd." (Senator Lane, p. 231.)

"There are some 14,000,000 negroes in the South. They are spreading themselves all over the United States. Everybody admits that they are an inferior race to the Japanese.

"* * * The Senate has today and yesterday voted down half a dozen amendments to this bill to exclude negroes from immigration into the United States. Neither the Independent Senator from the State of California nor the Democratic Senator will dare to say that the Japanese are inferior to negroes, and yet we got no help. We asked for bread, and you gave us a stone. You are not willing to vote to exclude negro immigration from the West Indies.

"You stand around and smile and risk international complications with Japan on a race issue about the Japanese, who are as highly civilized as you are.

"* * *

"The Japanese are not a race of barbarians; they

are not a race of veneered men; they are a race of people who have proven their ability to stand in the front ranks of civilization." (Senator Williams, pp. 388, 389.)

In the course of the debate, there are frequent statements that Japanese are ineligible to citizenship, but (pp. 234, 235) *Congress evidently did not know whether the Japanese were excluded or not.* Senator Lodge (p. 234) said:

"The only change from that bill which was vetoed (by President Wilson) was the insertion of the word 'Hindus'—'Hindus and persons who can not become eligible under existing law.' The purpose of that was to exclude Asiatic immigration, Mongols having been held by the courts to be not eligible to naturalization."

but he goes on to say that this form of words was extremely offensive to Japan. Senator Norris pushed Senator Lodge with the question why Japan objected to the language; they were either included or not included, either eligible or not eligible; and Senator Phelan asked, apropos of an amendment (not appearing in the enacted law) in which "white persons" were added to the various status and occupations not excluded, what was meant by "white persons," saying that the Hindus claim, in naturalization proceedings, to be white persons of the Aryan race, to which Senator Lodge assented, saying:

"Well, by the use of the expression 'white persons' you have no protection whatever under the naturalization law" (p. 234);
 "that is not defined" (p. 334).

"MR. PHELAN. The Japanese claim that they are white persons; the Hindus claim that they are white persons. It is a very dangerous proposition."

"MR. LODGE. Yes; they claim it, but it has not been so held. *I think it is a danger involved in the naturalization law, which is the foundation of the whole thing*" (p. 234).

"MR. LODGE. Nobody has ever claimed that Mongolians were of the white race."

"MR. PHELAN. The Japanese dispute that they are Mongolians."

"MR. LODGE. They may do so, but it has never been held by our courts that they were white" (p. 235).

"MR. NELSON. Would it not be more accurate, instead of saying 'white persons,' to say 'persons of the white race'? Would not that be more exact and more comprehensive, and is not the expression 'white persons' ambiguous?"

"MR. LODGE. I think the expression 'white persons' is more explicit, because when that expression is used it becomes a pure question of color, and you lose the ethnic distinction entirely. I am not sure that the employment of the term 'white persons' might not get us into some difficulties elsewhere, but 'white race' is not a scientific definition at all. The difficulty lies in trying to accomplish what is sought to be accomplished without using names. We are trying to avoid that" (p. 235).

In the Conference Committee the phrase "white persons" was deleted. From this it appears that the Japanese Government and the State Department and Congress deleted the provision in reference to persons who are not eligible to naturalization lest it should be an implied recognition that the Japanese might not be eligible, and that Congress fully understood that under existing law it was the Mongolians who were intended to be excluded, and that the Jap-

anese claim not to be Mongolians, but white persons within the existing law.

In this connection it is worth noting that among the Acts which are not repealed, altered or amended by this Act are all Acts relating to the immigration or exclusion of Chinese, among which Acts is the Act of May 6, 1882, forbidding naturalization of Chinese.

(f) ANY OTHER CONSTRUCTION WOULD BE VIOLATIVE OF THE EXISTING TREATY WITH JAPAN.

By the treaty with Japan of March 21, 1895 (29 Stat. L., p. 849),

"the citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property."

This treaty is still in force, but in April, 1911, a new treaty, dealing solely with commerce and navigation, was negotiated. *Each treaty contains the favored nation clause.*

Nothing could more clearly show the distinction made between Japanese and Chinese as to naturalization than that the *only limitation* on the rights of Japanese aliens in this country under the treaty of March 21, 1895, is the stipulation that the rights given

"do not in any way affect the laws, ordinances and regulations with regard to trade, *the immigration of laborers*, police and public security which are in

force or which may hereafter be enacted in either of the two countries."

Yamataya v. Fisher, 189 U. S. 86.

while the Chinese treaty of December 8, 1894, provided that Chinese

"either permanently or temporarily residing in the United States, shall have, for the portection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.*"

(g) THE ACT OF MAY 9, 1918, AMENDING THE UNIFORM NATURALIZATION LAW OF JUNE 29, 1906, TENDS TO SUPPORT THE VIEW THAT SECTION 2169 IS ONLY RESTRICTIVE OF TITLE XXX OF WHICH IT IS A PART.

The Act of May 9, 1918, does three things: it amends Section 4 of the Act of June 29, 1906, by adding seven new subdivisions numbered seven to thirteen; it repeals certain Acts so far as covered by these seven subdivisions; it validates all certificates of naturalization upon declarations of intention filed prior to September 27, 1906, and it incidentally rectifies an error in the original Act in reference to the District of Columbia.

The first of these new subdivisions numbered "seventh" is a curiosity chiefly because of the anomalous allegiance of the Filipino and Porto Rican. It provides that the native-born Filipino of required age who has made his declaration of intention, after service of not less than three years in the Navy,

Marine Corps or Naval Auxiliary Service and has an honorable discharge or discharge for reenlistment may

"on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision, it is shown that such residence can not be established";

while "any alien, or any Porto Rican not a citizen of the United States," of the required age who has enlisted in *any* of the branches of the army or militia, Navy or Marine Corps or Naval Auxiliary Service, or the Coast Guard, without restriction as to length of service provided that he has reenlisted, been reappointed, or has an honorable discharge or furlough to the Army Reserve or the Regular Army Reserve or has served three years on a vessel of the United States Government or a merchant or fishing vessel of more than twenty tons burden, may be so naturalized; while "any alien" serving in the military or naval service during the war may be naturalized without preliminary declaration or proof of residence; and any alien, who has served in the army or navy or *Philippine Constabulary*, been honorably discharged and entered military or naval service may be naturalized on three years' residence either in the United States, Philippine Islands or Panama Canal Zone, and petitions may be filed at the most convenient court either by an alien or a person owing permanent allegiance to the United States, who

comes within the subdivision, and may be heard immediately; the alien but not the person owing allegiance may file his petition without personal appearance and without fee, but the poor Filipino, inhabitant of the Canal Zone or Porto Rican not a citizen, apparently has to appear in person and pay his fees. This section appears to make distinctions between the Filipino in the Naval and Marine Corps and the Army, and between the alien and the person owing allegiance to the United States, on lines which are not at all clear.

Subdivision "eight" reenacts the Seamen Act; "ninth" provides for instruction in citizenship; "tenth" disposes of the declaration of intention in certain cases of misinformation; "eleventh" modifies the provision for the naturalization of alien enemies so that the declaration of intention must be made two years prior to the existence of the state of war and provides further security against fraud in the naturalization of alien enemies; "twelfth" for the resumption of citizenship by persons in the military service of the allies; and "thirteenth" provides for service in the military or naval forces of the United States wherever they may be, to be construed as residence in the United States.

The repealing section is obscure. Section 2166 is repealed excepting as to aliens prior to January 1, 1900, serving in the armies and with a discharge, also Section 2174, a portion of the Naval Appropriation Act of July 26, 1894, the like Act of June 30, 1914, and a portion of Section 3 of the Act of June

25, 1910, are repealed; excepting for the purpose of prosecuting for offenses, and the Act continues:

“That all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed; but nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined.”

There is no “seventh” subdivision of *this* Act unless it is that entitled “thirteenth” relating to continuous residents within the United States, but if the seventh subdivision of Section 4 of the Act of June 29, 1906, is referred to, there is nothing “specified” in that subdivision in reference to Section 2169 and there is no “limitation therein defined” of Section 2169, which is neither “repealed nor in any way enlarged” by that subdivision, or for that matter by any part of the Act itself, unless the contention made in this brief is to be sustained. If the effect of taking special cases of soldiers and sailors out of Title XXX and putting them into the Uniform Act of June 29, 1906, takes them out of the limitation of Section 2169, then, although that section is not repealed or for that matter enlarged, it no longer has any application, and in that sense the change is specified and the limitation defined.

II.

The point that Section 2169 enlarges and not restricts title XXX of the Revised Laws, has

never been adjudicated in any true sense, and the point that Section 2169 does not restrict the uniform Act of June 29, 1906, but is confined by its terms to Title XXX, has never been adjudicated at all.

(a) NO COURT EXCEPTING JUDGE LOWELL, *IN RE HALLADJIAN*, HAS TAKEN INTO CONSIDERATION WHAT THE SECTION PLAINLY SAYS.

No judge and no court has ever analyzed this section in connection with Title XXX, excepting Judge Francis C. Lowell, who said:

"Rev. St. 1873, Sections 2165-2168, omitted mention of 'free white persons,' thus opening naturalization to all aliens. Notwithstanding this universal inclusion, yet the special inclusion of Africans made by the act of 1870 was expressly, though needlessly, continued in section 2169, as follows:

"The provisions of this title (Naturalization) shall apply to aliens of African nativity and to persons of African descent."

"The intent of Congress in passing section 2169 in its original form was to insure by express inclusion the right of Africans to be naturalized like all other persons. By Act February 18, 1875, c. 80, 18 Stat. 318, passed 'to correct errors and to supply omissions in the Revised Statutes,' section 2169 was amended to take its present form, thus again limiting naturalization to (1) free white persons, and (2) Africans within the act of 1870. The broad phrase 'any alien' was left unchanged in sections 2165-2168, and its meaning therein was defined and cut down by section 2169. This is the most reasonable construction of section 2169 in its present form. To

make the additional express inclusion of whites by the amendment of 1875 operate to exclude all other persons from naturalization is an awkward construction, but seems inevitable. By Act May 6, 1882, c. 126, Sec. 14, 22 Stat. 61, the courts were forbidden to naturalize Chinese."

In re Halladjian, 174 Fed. 834.

But this was not necessary to the decision, for the point decided in that case is that an Armenian is a white person.

As a matter of fact, the opinions, from that of Judge Sawyer down, are based on the debates in Congress and not on the language of the provision. In the debate in 1870 the Chinese alone were referred to, and at that time the words "being a free white person" in existing law were restrictive. The remarks of Mr. Poland in 1875 show Congress intended to give the old meaning to the clause.

Even the language of a member of the committee cannot be resorted to for the purpose of construing a statute contrary to its plain terms.

Pennsylvania R. Co. v. International Coal Min Co., 230 U. S. 184.

And beyond the reports of the committee, this court will not go.

"The unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out."

Lapina v. Williams, *ubi supra*.

No court other than Judge Lowell has ever considered the language of the section, has ever taken into

consideration the fact that the amendment was not made to Section 2165 where, if intended to be restrictive as in the earlier law, it belonged, but to 2169, which was originally and still continues to be a broadening and not a restricting clause, but all these decisions, as we have said, are based on a pure supposition of what Congress intended to do, based on remarks of Mr. Poland and the desire of the western coast to exclude Chinese, which California evidently did not consider was safely done until the passage of the Exclusion Act of 1882.

(b) NO COURT HAS EVER PASSED ON THE POINT THAT SECTION 2169 IS CONFINED IN TERMS TO TITLE XXX OF THE REVISED LAWS.

The only question which has been adjudicated is whether Section 2169 is repealed, and it has been held that as Section 2166 is not repealed and would be governed by Section 2169, the Act of 1894 being similar, it restricted that Act also.

Bessho v. United States, ubi supra.

United States v. Balsaro, ubi supra, is a little nearer in language, but in that case the order admitting a Parsee was affirmed, and what is said on the question of the implied repeal of Section 2169 is *obiter dictum*. The Act of June 29, 1906, is assumed to be a part of Title XXX of the Revised Statutes of the United States. The requirement that the petition should set forth all material facts is not referred to, and what is said about the statement as to color

in the declaration of intention, overlooks the requirement that color is shown "as a visible distinctive mark" to identify the petitioner for naturalization, and is not required to be set forth in the petition as one of the material facts.

In re Alverto, 198 Fed. 688, a doubtful decision merely cites *United States v. Balsaro* as authority to the point.

Summing up these cases, the Bessho case decides nothing in regard to the Act of June 29, 1906. It deals with the limitation on the excepted classes, and the Act of July 26, 1894, which is said to be similar to Section 2166, which is not repealed, and, being a part of the title, would be controlled by Section 2169. What is said in the Balsaro case is dictum of the hasty and ill-considered sort; and Thompson, District Judge, in the Alverto case does not discuss the point, simply citing the dictum in the Balsaro case as decisive. In the Alverto case the petitioner relied on the Act of July 26, 1894, being the excepted classes, but also claimed under Section 30 of the Act of June 29, 1906.

III.

Section 2169, if applicable to the Act of June 29, 1906, must be construed as meant in the Act of March 26, 1790, and, so construed, "free white persons" means one not black, not a negro, which does not exclude Japanese.

(a) SECTION 2169, IF CONSIDERED AS A REENACTMENT OF THE EARLIER LAW, IS TO BE CONSTRUED IN THE LIGHT OF, AND WITH THE MEANING OF THE ORIGINAL ACT OF MARCH 26, 1790.

“* * * upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365.”

McDonald v. Hovey, 110 U. S. 619.

In the matter of Kang-Gi-Shun-Ca., 109 U. S. 556.

Crenshaw v. United States, 134 U. S. 99.

“The reenacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested.”

United States v. Le Bris, 121 U. S. 278.

There must be something clearly showing an intention to change the law.

Unted States v. Ryder, 110 U. S. 729.

The construction is with reference to the original Act.

“This rule has been repeatedly applied in the construction of the Revised Statutes.”

Hamilton v. Rathbone, 175 U. S. 414.

“The meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization Act of 1790.”

Ex parte Shahid, 205 Fed. 812.

(b) SO CONSTRUED, THE WORDS "FREE WHITE PERSONS" IN THE ACT OF MARCH 26, 1790, MEAN FREE WHITES AS DISTINCT FROM BLACKS, WHETHER SLAVE OR FREE.

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counter distinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race, and the Constitution, Article I, Section 9, provided that

"The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."

which provision was universally understood to be aimed at the abolition of the slave trade after that date. It was certainly not used in a scientific or technical sense.

Blumenbach's race classification, which has been cited by many as a basis for construing this Act, was published in Germany during the American Revolution in 1781. It was first translated into English in London in 1807 by Eliotson.

In re Dow, 213 Fed. 355, 365.

Dow v. United States, 226 Fed. 145.

It was only a few years before this, 1783, that Harvard had permitted those not preparing for the ministry to take French instead of Hebrew, and Charles

Follen became the first instructor in German in any college at Harvard in 1825, and it is well known that it was not until much later than 1790 that there was any Germanic influence in American education. In fact, it was an almost unheard of thing that Bancroft, after his graduation in 1817, should go to Germany for further study. No college or university taught anthropology until after the middle of the nineteenth century. The first systematic instruction was at Harvard in 1888 and at Clark University in 1889. The various instrumentalities for anthropological research have grown up since 1875. (*Americana* Vol. 1, Anthropology.)

None of the Senators or Congressmen had any education which brought them into contact with Blumenbach's classification when this naturalization law was passed in 1790. In the course of a debate on the law in 1790 Madison, who was then in Congress, said:

"They would induce the worthy of mankind to come, the object being to increase the wealth and strength of this country. Those who weaken it are not wanted." (*Legislative History of Naturalization by Franklin*, p. 40.)

In the same debate, Page of Virginia held that the European policy does not apply here, and that a more liberal system was permissible. It was inconsistent with the claim of Asylum to make hard terms. These would exclude the good and not the bad. He would welcome all kinds of immigrants; all would be good citizens. Lawrence of New York

declared that they were seeking to encourage immigration. All comers, rich or poor, would add to the wealth and strength of the country. Those speaking on the other side urged the apprehension from introducing paupers or criminals, or those lacking in character, in knowledge of or attachment to free institutions, for instance, Roger Sherman, who thought the intention of the constitutional provision was to prevent States from forcing undesirable persons on other States, and that Congress would not compel the reception of immigrants likely to be chargeable to a State. (*Idem*, p. 38.)

President Jefferson, in his first message to Congress, December, 1801, said, in recommending the repeal of the alien Act of 1798, and the revision of the laws on the subject of naturalization :

“Shall we refuse to the unhappy fugitives from distress that hospitality which the savage of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?” (*Idem*, p. 97.)

Judge Lowell, in the most exhaustive discussion that has been had upon the meaning of this section, after showing that race “is not an easy working test of ‘white’ color as required by Section 2169,” continues :

“Section 2169, however, makes no mention of race or of racial discrimination. ‘White persons’ are to be naturalized and (except Africans) no others. If we pass from racial speculation and remote history to the usage of the colonies and of the United States

in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattos, Indians, and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes, and Indians; that of 1774 as whites, blacks, and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes, and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children, and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves, and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790. 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic.' Page 80. Here, again, 'white' is made to include all persons not otherwise specified.

"The census act of 1790 (Act March 1, 1790, c. 2, 1 Stat. 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by 'color,'

and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored, and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St., Sect. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 219, Sect. 9, 25 Stat. 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' Eleventh Census, part I, p. XCIV. In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, Sect. 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese, and Japanese. In other instances 'colored' as opposed to 'white' was used to include negroes, Chinese, Japanese, and Indians. Throughout the Chapter cited in the above-mentioned Bulletin, it is assumed that all persons not classified as white, in the first eight

federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes requiring separate accommodation in travel. A statute of Arkansas required separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p. 17, c. 17, Sect. 4. See, also, Laws Fla. 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, subc. 4 (Code 1904, Sect. 1294d); Civ. Code S. C. 1902, Sect. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, Sect. 1231; Ky. St. 1909 (Russell's), Sects. 5607, 5608, 5642, 5765 (Ky. St. 1909, Sects. 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (Article 23, Sect. 11) reads as follows:

" 'Whenever in this Constitution and laws of this state the words "colored" or "colored person," "negro," or "negro race" are used, the same shall be construed to mean to apply to all persons of African descent. The term "white race" shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and

Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classified as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

In re Halladjian, ubi supra.

(c) "WHITE PERSON," AS CONSTRUED BY THE SUPREME COURT OF THE UNITED STATES AND BY THE STATE COURTS, MEANS A PERSON WITHOUT NEGRO BLOOD.

This was so held by the Supreme Court of the United States in construing Section 2154 of the Revised Statutes, and it was held

"that Congress meant just what the language used conveys to the popular mind."

United States v. Perryman, 100 U. S. 235.

namely, a person not a negro.

We shall give, in connection with citations from the dictionaries, a reference to the numerous States

which have used the expression "white person" to distinguish a person who has no negro, or only a part negro, blood in his veins since the abolition of slavery. The earlier statutes in the States are reviewed by Chief Justice Taney in *Dred Scott v. Sandford*, and he shows, by an examination of these, the provision in the Articles of Confederation using the term "free inhabitants," to describe those who were "entitled to all the privileges and immunities of free citizens, in the several States," and the naturalization Act of March 26, 1790, that the expression "free white person" was used to exclude members of the inferior and degraded negro race, whether free or slaves. In discussing the first Militia Law, passed in 1792, he says:

"The language of this law is equally plain and significant with the one just mentioned. It directs that every 'free able-bodied white male citizen' shall be enrolled in the militia. The word 'white' is evidently used to exclude the African race, and the word 'citizen' to exclude unnaturalized foreigners, the latter forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language."

Dred Scott v. Sandford, 19 How. 393, 420.

"White," as used in the legislation of the slave period, meant persons without a mixture of colored blood, whatever the complexion might be.

Du Val v. Johnson, 39 Ark. 182, 192.

(d) THE PRIMARY DEFINITION OF THESE WORDS, AS GIVEN BY THE GREAT DICTIONARIES, IS ONE WHO IS WHITE, NOT BLACK, NOR A NEGRO.

White is defined in the Standard Dictionary as

"1. * * * * * posposed to *black*. * * *

"2. Having a light complexion. (1) Of the color of the Eurafrian or Caucasian race: opposed especially to *negro*, but often to the yellow, brown, or red races of men."

The Century defines white as

"1. * * * * * The opposite of *black* or *dark*.

" * * * * *

"6. *Square*; *honorable*; *reliable*, as, a *white* man. (Slang, U. S.)"

Webster defines it as

"1. The opposite of *black* or *dark* * * *"

and defines a white person as

"a person of the Caucasian race (6 Fed. 256). In the times of slavery in the United States, *white person* is construed in effect as a person without admixture of colored blood."

"White person" is defined in the new Standard Dictionary as

"1. Any person of the Eurafrian race.

"2. (U. S.) Any person without admixture of negro or Indian blood. Since 1865 various legal constructions of this term have been made in different States, as in Arkansas, where a white person is one having no negro blood, or in Ohio, where one is

a white person who has just less than half negro blood in his veins."

Webster's New International Dictionary.

"In various statutes and decisions in different States since 1865 *white person* is construed in effect as a person not having any negro blood (Arkansas and Oklahoma). A white person is one having less than one-eighth of negro blood (Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Minnesota, Montana, Tennessee, Texas, Maine, North Carolina and South Carolina). A white person is one having less than one-fourth of negro blood (Michigan, Nebraska, Oregon and Virginia). A white person is one having less than one-half of negro blood (Ohio)."

(e) THE INSERTION BY CONGRESS OF THE WORD "FREE" IN SECTION 2169 IN 1875, A WORD WHICH HAD A DEFINITE MEANING IN 1790, BUT HAS NO MEANING IF CONSTRUED AS A NEW ENACTMENT IN 1875, SHOWS THE INTENTION TO REENACT THE OLD SECTION WITH THE OLD MEANING.

In 1790, as we have shown, "free" was inserted in the phrase "free white persons" to distinguish the class of aliens who could be naturalized from all negroes, whether slave or free. Again, at that time slavery existed in this country, and Congress had no power to forbid the slave trade, whether white or black. In 1875 there had been a complete change, not only in this country, but in the world. Slavery had been abolished in 1865 by the thirteenth amendment, and, as Dr. Francis Wharton used to say, be-

fore the Civil War freedom was sectional and slavery universal, whereas, after the war, freedom is universal and slavery sectional. If the word "free" refers to the condition of aliens in the United States, all aliens are free; if it refers to their condition in the country to which they owe allegiance, being domiciled in the United States, the land of the free, they have become free by the mere fact of coming into a free country.

IV.

Giving the words "free white persons" their common and popular acceptation in 1875, no "uniform rule" can be laid down, based on color, race or locality of origin, and there is nothing in the laws of the United States, its treaties, in the history of the time, or the proceedings of Congress, to show that Japanese were intended to be excluded.

(a) UP TO 1875, THERE HAD BEEN NO JAPANESE IMMIGRATION, NO SUGGESTION OF THEIR EXCLUSION, AND AMERICA HAD RECENTLY OPENED JAPAN TO THE WESTERN CIVILIZATION, WHICH JAPAN WAS GLADLY WELCOMING.

Up to 1875 few Japanese immigrants had entered America. In the decade of 1861-70, the immigration reports show that two hundred and eighteen arrived; in the next decade the number fell off. Exclusive of students, probably there were not fifty Japanese in

the whole country. The Asiatic immigration was Chinese, largely imported to build the Pacific railroads, of an entirely different character from the present Japanese immigration, of single men who did not come to establish homes; the women imported as slaves for immoral purposes. It was a race which came chiefly as contract laborers, expecting to return; and these immigrants are termed indifferently in the debates and decisions Mongolians and Chinese.

(b) JUDICIAL CONSTRUCTION OF THE PHRASE UP TO 1875 DOES NOT SUSTAIN SUCH AN EXCLUSION.

We have already cited the Dred Scott and Arkansas cases. There is little of judicial construction to be found. The Act was before the courts in New York and construed in an ably argued case, in which the Vice-Chancellor, referring to President Madison's declaration in the debates in the Federal Convention in 1787 that America was indebted to emigration for its settlement and prosperity, showed that the policy was to encourage emigration, and "to bestow the right of citizenship freely, and with a liberality unknown to the old world."

Lynch v. Clarke, 1 Sandf. 583, 649, 661.

Amongst the state Acts discussed are two in which it appears that Virginia amended a statute of May, 1779, Chap. 55, which limited citizenship to *free white persons*, in 1792 to include "*all free persons*" (pp. 666, 667).

A decision by a divided California court, that the words in the 14th section of the California Act of April 16, 1850, providing that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man," included a Chinaman, holding that the term "Indian, from the time of Columbus to the present time, had been used to designate 'the whole of the Mongolian race,'"

"that 'White' and 'Negro' are generic terms, and refer to two of the great types of mankind."

"and that, even admitting the Indian of this continent is not of the Mongolian type, that the words 'black person,' in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."

People v. Hall, 4 Cal. 399, 404.

This decision does not seem to have been treated with much respect as a matter of reasoning; the legislature speedily amended the law, and the same court held that while *People v. Hall* must be followed,

"we cannot presume that all persons having tawny skins and dark complexions are within the principle of that decision."

and allowed a Turk to testify on the ground that the Caucasian type predominated and constituted the controlling element.

People v. Elyea, 14 Cal. 145.

All that Chancellor Kent says is that he "presumes" that the phrase excludes the inhabitants of

Africa and their descendants, and then he suggests that it *may* become a question to what *extent* persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify, and

"Perhaps there *might* be difficulties also as to the copper-coloured natives of America, or the yellow or tawny races of the Asiatics, and it may well be *doubted* whether any of them are 'white persons' within the purview of the law."

2 Kent's Comm., p. 72.

(c) NO "UNIFORM RULE," APPLICABLE IN ALL CASES, CAN BE DRAWN FROM THE DECISIONS SINCE 1875.

It has been held by this court that a Chinese person cannot become a naturalized citizen under the laws of the United States of May 6, 1882.

Low Wah Suey v. Backus, 225 U. S. 460.

A more accurate statement than the earlier one by Chief Justice Fuller, commented upon by Judge Lowell,

"That a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress."

In re Ah Yup, ubi supra.

That "a person of Mongolian nativity" was a native of China and cannot become a citizen (*In re Hong Yen Chang*, 84 Cal. 163); that a Burmese, being a Malay, "who under modern ethnological subdivisions are Mongolians, is not eligible (sic.)" (*In re San C. Po*, 28 N. Y. Supp. 383); that it "include mem-

bers of the white or Caucasian race as distinct from the black, red, yellow and brown races" (*In re Alverto*, ubi supra) ; "The Caucasian race only" (*In re Akhay Kumar Mozumdar*, 237 Fed. 115).

"Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them?"
In re Dow, 213 Fed. 355.

"It would not mean Caucasian."
Ex parte Shahid, ubi supra.

It would include persons on the European side of the Mediterranean, although racially descended from many sources, the generally received opinion being that they were white persons.

Dow v. United States, 226 Fed. 145.

It would include a Parsee.

United States v. Balsara, ubi supra.

It would not include a half white and half Indian, because not of the Caucasian race.

In re Camille, ubi supra.

Speaking of the section, Judge Lowell, from whom we have already quoted, sums up the whole matter:

"That section implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Here it is impos-

sible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied upon section 2169 without making distinctions which Congress certainly did not intend to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in Section 2169."

In re Mudarri, 176 Fed. 465.

In cases dealing with Japanese, Judge Colt held *In re Saito*, 62 Fed. 126, that the Japanese were excluded because Congress refused to extend naturalization to the Mongolian race, and classes Chinese and Japanese on the same footing.

Judge Hanford holds that Japanese are excluded because of

"the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

In re Buntaro Kumagai, 163 Fed. 922.

He does not say what race the Japanese belong to, nor what race is predominant.

In the Bessho case Judge Goff would seem to ex-

clude Japanese because "all alien races except the Caucasian are excluded," and Judge Chatfield because

"A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized."

In re Knight, 171 Fed. 299.

The Washington court would seem to exclude them because the naturalization law applied merely to the Caucasian race, and that it had been held *In re Saito* that a native of Japan was of the Mongolian race (*In re Yamashita*, 30 Wash. 234, 70 Pac. 482); the Utah court held that a Hawaiian, not being of the Caucasian or white race, or of the African race, was excluded. The court seemed to include the Hawaiians as *Mongolians*! (*In re Kanaka Nian*, 6 Utah 259, 21 Pac. 993); Judge Maxey admitted a copper-colored Mexican, who apparently was an Indian of unmixed blood, holding that Judge Sawyer's decision might well be limited to members of the Mongolian race, and while the applicant would not be, by any strict scientific classification, classed as white, he fell within the liberal intent of the statute, as shown by the course of the United States Government in annexation and treaty, citing *Lynch v. Clarke*, ubi supra, as to the liberal policy (*In re Rodriguez*, 81 Fed. 337). Judge Maxey cites the Acts establishing territorial government for New Mexico and Utah, each of which use the expression "free white" to describe those entitled to vote, but which in the same section clearly recognize, as in-

cluded in that definition, Mexicans who are not white or of the Caucasian race (p. 352).

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolian. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in State and Federal courts.

In fact, the census of 1910 shows 209 American-born citizens, 420 naturalized, and 389 with first papers, who are Japanese.

American Democracy and Asiatic Citizenship
(Gulick), p. 185.

(d) SUCH EXCLUSION IS INCONSISTENT
WITH FRIENDSHIP OF AMERICA WITH
JAPAN.

It is unnecessary to say anything upon the warm friendship of Japan toward America and America toward Japan from the time the hermit nation was opened up by Commodore Perry. Japan looked upon America as her friend and type until she was rudely awakened by the attitude of the United States Government during the Russo-Japanese war and events

in California. The world war has contributed, however, to restore the relationship which existed unimpaired for half a century.

The feeling of the United States before the passage of the Act of 1906 is shown in the Annual Message of President Cleveland of 1894, who says (Message and Papers of the President, Vol. 9, p. 529) :

"Relations with this progressive nation should not be less broad and liberal than with other powers."

The announcement of what was really the admission of Japan to the family of nations by the treaties of 1899 in President McKinley's message of December 5, 1899, and the special message of President Roosevelt, December 18, 1905, confirm this.

The feeling of the Japanese towards America is nowhere better expressed than in the preface and the first chapter of Kawakami's remarkable book on "Japan in World Politics."

V.

The words "Free White Persons," neither in their common and popular meaning, nor in their scientific definition, define a race or races or prescribe a nativity or locus of origin. They deal with personalities and the qualities of personalities, and are only susceptible of meaning those persons fit for citizenship and of the kind admitted to citizenship by the policy of the United States.

(a) The words deal with individuals, not with races, nor with natives of any country or of any particular descent.

(b) The word "free" is an essential part of the clause. Under the old English law, it means a freeholder as distinguished from a serf. Under the Constitution, it is used in opposition to slave. It is a condition which the Declaration of Independence asserts all men are born to. It imports a freeman, a superior, as against an inferior class.

(c) "White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

(d) "Person" is "a living human being; a man, woman or child; an individual of the human race." (*U. S. v. Crook*, 25 Fed. Cas. 695.) The provisions of the 14th amendment in reference to persons "are universal in the application to all persons within the Territorial jurisdiction without regard to any difference of race, or color, or nationality." (*Y. Wo v. Hopkins*, 118 U. S. 369.) The same rule has been applied to include aliens under the 5th and 6th Amendments. (*Wong Wing v. U. S.*, 163 U. S. 235.)

(e) No case has considered this point or given emphasis in the construction of the section to the words "free" and "persons," which are as important to the

construction as the word "white." Nearly all think the section deals with *races*.

VI.

The question certified is whether all Japanese as a people are excluded from naturalization which would exclude a "person" who is "free," who is "white," because he is a Japanese.

The question certified does not deal with individuals, but with a people, and the affirmative answer would exclude a Japanese who is "white" in color and is of the Caucasian type and race. No argument can accentuate this point more strongly than the mere statement of it.

VII.

The Japanese are "free." They are, or at least the dominant strains are "white persons," speaking an Aryan tongue and having Caucasian root stocks; a superior class, fit for citizenship.

"Of one blood hath He made all nations," says Paul; and from the time of Aristotle, science, as well as religion, has taught a common origin of mankind, and many of the great races today unite in common blood variations from one cause or another and centering in that common blood. Even Blumenbach, who is the father of modern anthropology, says that

"Innumerable varieties of mankind run into one another by insensible degrees."

He invented the division into Caucasian, Mongolian, Ethiopian, American and Malay, of which the *Britannica* say, referring to the term Caucasian:

"The ill-chosen name of Caucasian invented by Blumenbach * * * and applied by him to the so-called white races, it still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races."

2 *Enc. Brit.*, p. 113.

On the other hand, Cuvier divides the races into Caucasian, Mongol and Negro, corresponding to white, yellow and black, but this is clearly not sufficient.

Huxley distinguishes four principal types of mankind, the Australoid, Negroid, Mongoloid and Xanthochroic ("fair whites"), adding a fifth variety, the Melanochroic ("dark whites").

2 *Enc. Brit.*, p. 113.

but that work adds, page 114,

"The doctrine of the unity of mankind stands on a firmer base than in previous ages."

and Volume 9, *Enc. Brit.*, p. 851, includes in the Caucasian race certain of the Brown Polynesian races, including Hawaiians and the Ainus.

In "Man Past and Present," Professor A. H. Keane, F. R. G. S., in the "Cambridge Geographical Series," describes mankind under four leading types,

which may be called black, yellow, red, and white, or Ethiopic, Mongolic, American, and Caucasian. He distinguishes Mongolians into three kinds: Northern, Southern, and Oceanic, extending from Finland to the Philippines, and reckons the Japanese among the Northern Mongolians, whose color is thus described:

"Light or dirty yellowish amongst all true Mongols and Siberians; very variable (white, sallow, swarthy) in the transitional groups (Finns, Lapps, Maygars, Bulgars, Western Turks, and many Manchus and Koreans); *in Japan the uncovered parts of the body also white*" (p. 266).

The Encyclopaedia Britannica, Vol. 11, p. 635, commenting upon Professor Keane, says:

"The contrast between the yellow and the white types has been softened by the remarkable development of the Japanese following the assimilation of western methods."

The decisive test which modern science has applied is cranial measurements, and it is this test which has excluded the Japanese from the Mongolian division, although Dr. Munro, hereafter quoted, referring to the fact that "Every human being is a mixture of root stocks," in a letter says:

"It cannot be said that the Japanese are a Mongolian race, but Mendel's rule holds good and one may see pure Mongolian forms sometimes. I have seen a pure Mongolian type in the child of an American Missionary (except the complexion and colour of the eyes) and this type is fairly common in East-central Europe.

"The preservation of a conventional racial type is a matter of aesthetics. What really counts in humanity is home influence and education, and where the ideals are high, the racial type is of little moment. But as the prejudice exists and as each nation has the right to choose its physique, the best plan, as it seems to me, would be for the Japanese authorities to make some selection, from the anthropological point of view, of those going to the States. With regard to the present case, I shall be glad to help if I can, and would be glad to make an examination. The head form and facial indices would suffice."

It is common observation that the women of the Kyoto region in Japan, particularly the higher class, are white, not darker than many of the women of this country. The Ainu, an admitted Caucasian, is the darker. The influence of climate and habit has much to do with the matter of complexion. Ellis, in his *Polynesian Researches*, speaking of color, says that Polynesian infants are born little darker than European children.

Hawks' Narrative of Commodore Perry's Expedition to Japan, published by order of Congress in 1856, is the first authoritative and perhaps the only governmental expression on the origin of the Japanese. He says:

"Kaempfer brings them from the plains of Shinar, at the dispersion. He supposes them to have passed from Mesopotamia to the shores of the Caspian, thence through the valleys of the Yenishi, Silinga and parallel rivers to the lake of Argueen; then following the river of that name which arises from the lake, he thinks they reached the Amoor, following

the valley of which they would find themselves in the then uninhabited peninsula of Corea, on the eastern shores of Asia. The passage thence to Japan, especially in the summer season, would not be difficult. He supposes that this migration occupied a long time. * * * This, if not satisfying, is at least ingenious. * * * Dr. Pickering, of the United States exploring expedition, seems disposed, from an observation of some Japanese whom he encountered at the Hawaiian Islands, to assign to them a Malay origin."

and speaking of their alleged Tartar origin, continues:

"But they certainly do not have the Tartar complexion or physiognomy. The common people, according to Thunberg, are of a yellowish color all over, sometimes bordering on brown and sometimes on white."

He also quotes the latter authorities as saying:

"That ladies of distinction, who seldom go out into the open air without being covered, are perfectly white. Siebold also, speaking of the inhabitants of Kiusiu, informs us that, 'the women who protect themselves from the influence of the atmosphere have generally a fine and white skin, and the cheeks of the young girls display a blooming carnation.'"

"In general the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which white assume as their own privilege." (Ratzel's History of Mankind, Vol. 3, p. 454.)

Ratzel, after referring to the fact that the lower classes are darker, says:

"Japanese, however, sees the ideal of his breed in fair skin, dark sleek hair and slender figure."

He quotes a story from Broca to show the similarity in appearance between the Brazilian and the Japanese.

Woodruff, in his "Effect of Tropical Life on the White Race," is struck by the fact that Japan is a counterpart of Great Britain, and Dr. Brown, from whom we will quote, has emphasized this in enforcing his view that the dominant races of man are maritime and that to make a great maritime people requires a high proportion of broken coast line to the area of the country, and preferably islands running north and south with a variety of climate.

Other authorities have sought to account for the mental alertness of the Japanese, a quality of mind in which they differ from other Asiatics and resemble the Europeans and the inhabitants of North America above the Mexican line. The Japanese are commonly called "The Yankees of the Orient," and they show no marks of the degeneracy common in the mixture of non-assimilable races. Doctor Baelz of the Imperial University of Tokyo is quoted by Kawakami in "Japan in World Politics," p. 112, upon this point, which has been with him a subject of research.

The history of the people who inhabit the islands of the Pacific has not yet been written, and even the standard authorities fail us as to their origin and affinities. The most reliable authority on Polynesia is Dr. J. Macmillan Brown, Vice Chancellor of the University of New Zealand, and on Japan, Dr. N. Gordon Munro, and a better understanding of these

peoples can be had from their recent work than from any other source.

Some conclusions are now fairly well demonstrated: that the Polynesians are a Caucasian race speaking an Aryan tongue, springing from the earlier Mediterranean race and allied to the later Baltic peoples of Europe; that a great nation once inhabited a continent now submerged in northwestern Polynesia, of which the capital was Ponape, in the Carolines—the stone remains showing an ancient city of 100,000 inhabitants, perhaps the fabled Hawaiki of the Polynesians; that the root stocks of the Japanese people are the Ainu in the north and the Yamato in the south, each Caucasian, the latter of the Mediterranean stock; that there was probably a palaeolithic as well as a megalithic invasion of Polynesia from Japan; that affinity is shown by the linguistic attitude of the Polynesian people which faces towards Japan; in the patriachate or headship of the father as against the matriachate; in its vocabulary and phrenology; again, from the location of the Polynesian spirit land or Hawaiki, for as the soldiers to-day at the Western front speak of the dead as “going West,” so the souls of the departed Polynesians were said to have “gone West”; and finally by the maritime character of these people, for the Mongolian is primarily a landlubber, while the Japanese and the Polynesian are daring lovers of the seas.

Dr. Brown, in a paper delivered before the Hawaiian Historical Society, September 5, 1918, says that,

"The phonology of the Polynesian dialects differs by the whole world from that of all the languages to the west of it * * * There are only two languages in the Pacific Ocean which have the same phonological laws, the Japanese to the northwest and the Quichua to the southeast * * * The range of sounds in Japanese is nearly the same as in Polynesian."

"In fact, as Fornander points out, the primitive Aryan language must have had exactly the same range of consonants as Polynesian, and though the process was not carried so widely among the vowels, the decadence and interchange of consonants had begun. The homeland of the primeval Aryan is now accepted as in Europe between the Baltic and the Black Sea, and that was a cold region in which the organs of speech were capable of difficult consonantal sounds; whilst the environment of Polynesian after it reached the Pacific was tropical and exactly suited to the decay of the consonants."

and again :

"The primeval Aryan languages must have traveled from Europe west of the line between the Baltic and the Black Sea through Asia, long before Sanskrit began its long migration into India or even began its elaborate inflectional system."

"The linguistic attitude of Polynesia faces north towards Japanese and Ainu, which have got no such restriction on their use of nouns and numerals. That the Polynesian vocabulary looks also to some extent in that direction will be apparent from a few examples."

In his "Maori and Polynesian" Dr. Brown, in addition to proving that the Polynesians spoke an Aryan tongue and were of the Caucasian race, springing originally from the north of Africa, on the shores of the Mediterranean, thence migrating to the Baltic,

and through southern Siberia, Lake Baikal, Korea and Japan, the megalithic track continued into Polynesia by a course involving much less sea than in the present age, when a large portion of Polynesian continent has subsided (pp. 3-5, 26, 27, 38, 59, 118, 252, and 253), points out the resemblance to the Japanese in maritime skill and love of the sea (p. 7), which is essentially Caucasian and not a trait of the Negroes or Negroids, Mongols or Mongoloids, that the route through Japan and Polynesia is the dolmen route, that the Japanese and Polynesians show affinities in art, in sports and in other habits of life (pp. 49, 50, 201, and 265), and that Polynesia affiliates with Japan in the patriarchate or father-headship as against the matriarchate or mother-right (pp. 38 and 250).

Dr. Munro, with Dr. Baelz's work as a basis, and much new material on which to base his conclusions, including the work of Gowland, Tsuboi, Baron Kanda, Aston, Torii, Takahashi and Wada, in a paper before the Asiatic Society of Japan, at Keio University, March 21, 1917, dealing with the two root people, the Ainu and the Yamato, particularly with the Yamato, says:

"In respect to the personal investigation I have some justification in the knowledge that the demonstration of Ainu culture in the shellmounds of Honshu and Kyushu and of Yamato remains in shellmounds and stone age sites of the South is pioneer work, far from complete, but establishing the Ainu as aborigines and the Yamato root-folk as having

also a birthright, if not as the prior autochthones of Japan * * *

He then goes on to say:

"* * * at the risk of again overcrowding material I shall first show some representative pictures of material preserved in and by association with the sepulchres of the Yamato and shall follow this with illustrations of these sepulchres themselves. I shall then present some evidence of similar sepulchres and of magalithic monuments in Europe with a rough sketch map showing their prevalence in the Mediterranean area and through the Eurasiatic continent. * * *

finding the immediate source of this culture in

"Korea, the proximate habitat of the Yamato invasion and immigration. From thence in all probability, came the virile forces of the iron wielding 'horseback domination' which ultimately united with the agricultural pre-Yamato folk of Kyushu and possibly around the Inland Sea."

where he thinks these people may have lived for a considerable time before invading Japan.

After referring to prototypes in Europe, in Egypt, in Greece and around the Mediterranean generally, he says:

"We must, however, leave such parallels in culture and I can steal only one minute from our remaining time to point out the course of the ancient Japanese concept the *Mitsudomoe*, which is here shown and which from these examples may be traced into China and thence into Babylonian culture and that of the Mediterranean prehistoric civilization, where it is found on the spindle weights of Troy. It was also familiar as the anthropomorphic concept in the sun

in almost every land (Egypt perhaps excepted) conventionalised from the biped concept as a sign of mankind."

and after describing the sepulchres themselves, and discussing whether there was any contact with China, he concludes :

"But it is not necessary to suppose that this 'Horse-back domination' ever came into close contact with the Chinese before settling in Korea.

"Where then did the dolmen originate? That is likewise uncertain. But we know where dolmens existed at a date long anterior to those in Japan. That was in North Africa and in Europe, where dolmens contain relics of the later stone age and the early metal phases of copper and bronze, but rarely the least trace of iron. In Japan, on the other hand, the dolmens are of the iron age, with vestiges of the bronze period and mere traces of a stone age in conventional offerings."

and says there is something maritime in the character of the people of allied culture, and tracing this course he continues :

"This culture did not spread into Egypt, though there are two patches on the Nile, but it is found in Syria and Palestine round the Black Sea and between it and the Caspian, in the Caucasus and southern Russia whence it spread into Siberia in a mitigated form. It also entered Arabia, Madagascar and Persia, while in southern and central southern India it was established on an immense scale. Whether it reached India by sea or land is not yet certain, but traces at least are known in northern India and it has been followed into Burmah."

after which he still further concludes that it is mari-

time, referring incidentally to the remains before referred to on the Island of Ponape, described by Christian in his book on the Carolines, and says:

“* * * if we note the similarity of special designs and contrivances between East and West in prehistoric times, we have, I think, good ground for the belief that the dolmen culture of Japan was rooted in the Mediterranean area. It is a far cry from Japan to this area or to the region of the five seas, and it may be premature yet to insist on any limited area for the provenance of the Caucasian element in the Japanese people.

“Whether there was any connection between the Yamato root-folk in Kyushu and the infiltration of European stock into the Pacific which resulted in the so-called Polynesian race, is another problem which is not yet ripe for solution. Any such connection must have been at a very remote age.” * * *

and in conclusion says:

“My opinion is that the Yamato root-folk of Kyushu and the present Polynesian people diverged from an Indonesian or other stock of European affinities in the very early stage of the neolithic or polished stone age, possibly in later palaeolithic times.

“The Korean contribution to the Yamato probably came not only from the southern coast of Asia and the islands near to it, but also through Manchuria, possibly migrating in part from the Caspian sea, and keeping north of the fortieth parallel. Otherwise it seems to me that this migration through Asia must have occurred before the Chinese civilization had concentrated south of that latitude. I do not doubt that some Mongolian element had penetrated the islands to the south of Japan in ancient times; indeed, I have evidence of it. But I think this element was considerable and that we must look to the soldiery and the agricultural serfs in the Korean immigration for

the Mongolian component persisting in Japan. That this ingredient is present admits of no question, but that is a very different thing from the assertion that the Japanese are a Mongolian race. I affirm that the Japanese are not predominantly Mongolian. Physical anthropology teaches us that the Japanese, as we ourselves, are a mixture, a conglomeration of characters of primitive as well as of advanced mankind. If I have been at all successful in demonstrating this in my first lecture; if we have come to the conclusion that the Ainu are, if themselves mixed with other characters, an early European stock, that they have mingled to some extent with the Yamato stock, considerably in the South and noticeably in the North; if the considerations which I have just brought forward with regard to the European provenance of Yamato culture have any validity in conjunction with the decided evidence of European traits in the physique of the modern Japanese, we cannot resist the conclusion that the word Mongolian is not a fit designation for the people of this land."

Little need be added to the tributes in the Senate of the United States, which we have quoted from the debate on the immigration Act of 1917, but a summary of the history of the Japanese people during the last five or six hundred years by George Kennan, the distinguished traveler, which we take from *The Outlook* of June 27, 1914, is in point:

"At the beginning of the seventeenth century the Japanese were the most daring and adventurous navigators in all the Far East. Their insular position made them hardy and expert sailors, and they had at sea a natural intrepidity which was almost equal to that of the Northmen. At the very dawn of authentic history their ships were cruising along the coasts of China and Korea, and as early as the sixth century an armed Japanese flotilla sailed northward

to what is now Siberia and ascended the Amur River for the purpose of invading Manchuria. * * *

"Toward the close of the fifteenth century Japanese merchants began to extend their foreign trade to countries not previously visited, and as early as 1541 they had established commercial relations with more than twenty oversea markets, and were sending their ships to regions as remote as Java, the Malay Peninsula, Siam, and the western coast of India. In 1594, twenty-six years before our Pilgrim Fathers landed on the coast of Massachusetts, the Japanese had a regular line of merchant ships running to Luzon, Amoy, Macao, Annam, Tonquin, Cambodia, Malacca, and India, and making, without any great difficulty or danger, out-and-return voyages of from three thousand to twelve thousand miles. * * * They were quite capable of crossing the Pacific, and, as a matter of fact, two of them did go to Acapulco and back in 1610 and 1613. The sailors who manned these vessels were not as experienced as were the Spanish and Portuguese navigators of the same period, but what they lacked in experience they made up in enterprise, daring and resourcefulness. * * *

"All the Japanese of that time were imbued with an ardent spirit of daring and adventure, and long before the Mayflower sailed from Plymouth they had settlements, or colonies, in countries that are farther away from Japan than Massachusetts is from England. They took possession of the Luchu Islands, overran Formosa, helped the Spanish Governor of the Philippines to put down a revolt of the Chinese in Luzon, gained a strong foothold in Siam, and, fighting there in defense of the King, defeated invading forces of both Spaniards and Portuguese. Everywhere they were regarded as dangerous enemies, and in the library of Manila there is still in existence a copy of a letter written by a Spanish friar to his home government in 1592, warning the authorities of Spain that the Japanese were 'a very formidable people,' and that their great Shogun, Toyotomi Hide-

yoshi, was likely to invade the Philippines as soon as he had finished the conquest of Korea. * * *

"There is a widespread popular belief that in the Middle Ages, and, indeed, long after the Middle Ages, the Japanese were an uncivilized if not a barbarous people; but this belief is based wholly on ignorance or misapprehension of their history and institutions.

* * * As early as the seventh century the Japanese had schools, and before the beginning of the eighth they had established in Nara and Kyoto Imperial universities with affiliated colleges and courses of instruction in ethics, law, history, and mathematics. The oldest university in Europe, that of Salerno, in Italy, was not founded until one hundred years later. The Japanese opened a great public library at Kanazawa in 1270, and established their first astronomical observatory more than a century before Commodore Perry entered Uruga Bay.

"Even in the field of material achievement, the mediaeval Japanese were pre-eminent. They would have regarded our invasion of Cuba with a force of 16,000 men as a very trivial affair. In 1592 their great leader, Hideyoshi, transported 200,000 men across the Tsushima Strait to Korea, and his first army corps, under General Konishi, marched 267 miles in nineteen days, fighting one pitched battle, storming two fortresses, and carrying two strongly-intrenched positions by assault. General Shafter was never more than eighteen miles from his sea base, while General Konishi, with Hideyoshi's first army corps, went 400 miles from his base at Fusan, and maintained intact through a hostile territory a line of communications. * * *

In connection with the voyages to South America more than three hundred years ago, alluded to by Doctor Griffis—and there are some indications that there was a line running to South America at that time—it is worth noting that the only line now run-

ning from the Orient to South America is Japanese, a fact commented on by Bingham in "The Monroe Doctrine," pp. 90-95, and in this connection Kawakami gives the Japanese in South America in 1910 as 21,878, of whom 15,462 are in Brazil and 5428 in Peru.

VIII.

The Japanese are assimilable.

The debates in Congress and the literary controversies embodied in many books and articles on the Japanese question reduce the objection to Japanese naturalization to the claim that they are "non-assimilable." (Senator Phelan, p. 284; Senator Works, p. 228.) This means that it is impossible for them and undesirable for us to have them adapt themselves to western ideas. This is a reversal of our traditional national policy, for it was President Fillmore who sent Commodore Perry to overturn the Japanese policy, which sought to prevent assimilation, and open up Japan to western civilization. The first article of the Perry treaty of 1854 declares:

"There shall be a perfect, permanent, and universal peace and a sincere and cordial amity between the United States of America on the one part, and the Empire of Japan on the other, and between their people respectively, without exception of *persons* and *places*."

Having given Japan the bread of western civilization, shall the Japanese be forbidden to eat it? In

view of the last sixty years, the charge is ridiculous. In what respect are they non-assimilable? Do they not have high ideals of honor, of duty, of patriotism, of family life, of religion and of social duty, and do they not adhere to these better than we do? The dignity of manhood is held up by the Declaration of Independence as the highest ideal of Americanism. How about our treatment of the black man in the south, or the Oriental in the west? In art and literature, the criticism of the Japanese today is of the abandonment of their ideas, and too easy adaptation to western methods. In religion, Buddhism and Shintoism have been infused from some source so strongly with Christian ideals that their followers do not see the contrasting splendor of the Christian faith as strongly as awakened Korea does. Of course, they have a race prejudice, but nothing compared with that of the Jew, whom we gladly welcome and protect even in foreign lands, who sits in the halls of Congress, in our highest courts, amongst our executives, in the marts of trade. Naturally, a Japanese prefers to marry a Japanese, not only on account of race prejudice, but for other obvious reasons; but they do intermarry with whites, and the almost uniform testimony is that they have happy families and vigorous progeny, preeminently American. Section 2169 authorizes the naturalization of black men, but half the States forbid marriage between whites and blacks.

We would hardly require the Japanese to assimilate our manners, for their manners, particularly of

the women, are far superior to our own. If, as seems true, the only argument against the fitness of the Japanese for naturalization is their non-assimilability, the argument is ended, for it is preposterous to claim that a nation which has shown itself to have the greatest capacity for adaptation, against whom the severest criticism is that they are imitators, is not capable of adapting itself to our civilization.

It cannot be said that the Japanese do not come to make a home, or that they have not that earth hunger which led our ancestors to cross the sea. The earth hunger of the Japanese and the wish to make a home is the objection of California. It cannot be said that he lowers the standard of living. The "drastic investigation" authorized by the California legislature of 1909 found that the Japanese employed by white farmers were paid as much as white laborers, and that the Japanese paid more than the white man.

Race prejudice will always exist. It is innocuous in Hawaii, where the variety of race prejudices renders any dominant race prejudice impossible.

Finally, the change in the last fifty years in the habits, attitude towards the world, and the Constitution of Japan is a sufficient answer.

The story of the Japanese in Hawaii is significant. They are estimated to comprise 97,000 out of a population of 228,771, exclusive of the army and navy (Report of the Governor of Hawaii to the Secretary of the Interior, 1916, p. 4), or 42.5 per cent.

In business, the report shows that out of 1780 inde-

pendent houses of business in Honolulu the Japanese have 754; while in Hilo, out of 398, they have 248, or 1002 out of 2178, 46 per cent—slightly higher than the proportion of population.

The Japanese have the lowest percentage of convictions of crime in proportion to population, namely, 2.39 per cent, excepting the whites (including the Portuguese), who have 2.26 per cent. Excluding the Portuguese, the whites would have a higher percentage (p. 74); and the Japanese convictions are chiefly, like the Chinese, for gambling. Thus, the Japanese, although having 42.5 per cent of the population, have but 13.31 per cent of the prisoners, less than a third in proportion (p. 77). Of the delinquent and dependent boys and girls brought before the Juvenile Court, there were only 54 Japanese, or 9 per cent, whereas the proportion of population is 42.5 per cent. If convictions for gambling are eliminated (see report of the Chief Justice to the legislature), there are 1794 convictions of whites (including Portuguese), with an estimated population of 35,322, to 1686 convictions of Japanese. In other words, (gambling aside) there are three white convictions to one Japanese, in ratio to population.

Much has been said about the picture brides and divorces, but from the records of the Circuit Courts of Hawaii, in the same report of the Chief Justice, it appears that in 1916, 379 divorces were granted in the Territory, 193 of which were Japanese, but 8 per cent larger than the percentage to population. This result should be surprising to one who is not familiar

with the care which is bestowed on marriage by that method.

Mr. M. M. Scott, for thirty-five years the honored head of the High School in Honolulu and known to every student of the Japanese, and the recipient of especial recognition by the Japanese Government for his studies of the Japanese, says of their racial origin and assimilability, in a memorandum summing up what he has published at various times :

"The Japanese people are classed as Mongolians by those who know absolutely nothing about physical anthropology. Those physical anthropologists that have studied bodily characters of the Japanese, all agree that they do not belong to the Mongolian race, whose main habitation is in Central Asia. Kaempfer, Titsingh, Von Rein, Morse and Bachelor, who were all skilled anthropologists, feel sure that whatever mixture there may be in their racial stock, Mongolian blood is not the predominant, nor even a large element in the Japanese. Not one of them would be rash enough to say what element of blood is the predominant one. The Japanese are a very mixed race, as any one may observe who travels from the extreme north to the extreme south of their elongated Empire.

"I have been acquainted with the Japanese people for forty-five years. I was, by invitation of the Japanese Government, for ten years from 1871 in their service in establishing a system of elementary schools throughout the country. In no one physical character do the Japanese people correspond to a like physical character of the true Mongolian. Neither in color of skin, nor pigment, nor stature, nor in measurement of limbs, above all, in 'cephalic index,' the surest character to determine race, can the Japanese be called Mongolians.

"First as to color of skin. In certain parts of

Japan, regarded by their own ethnologists, the skin and pigment therein are more nearly white than yellow or brown. In the town of Sendai, in the north of the main island, the skin of the children and the women not in the fields would be taken by strangers, as belonging to the white race, rather than to any of the classified colored races. Likewise, in the typical Japanese city of Kyoto, those not exposed to the heat of the summer sun are particularly white-skinned. They are whiter than the average Italian, Spaniard or Portuguese.

"As before mentioned, the one character regarded by all anthropologists as the main one, is the 'cephalic index.' Now, the 'cephalic index' of the average Japanese corresponds more nearly with the Central European skull than it does with Chinese or Mongolian. The 'cephalic index' is from eighty to eighty-two, about the same as the great Germanic race. The modern anthropologist, Ratzel, regarded the world over as one of the most distinguished on this subject, agrees with the earlier writers mentioned in the foregoing part of this sketch. As to the possibility of assimilation to American standards of government and all other things American, I regard the Japanese as one of the most assimilable of all the races of man, or what is known in the United States as the 'New Immigration.' Truth to tell, since the Japanese have become a settled people, ethnically homogeneous, they have been assimilating everything they were shown from other nations. For a thousand years, with no intercommunication, except slight ingress and egress with China and Korea, they borrowed from China and Korea letters, literature and the art of porcelain making. They have improved by their peculiar genius on everything they borrowed from these two places.

"Since the opening of Japan by Commodore Perry in 1854, treaties and communications with Western Nations have enabled the Japanese to assimilate science, industries, commerce, and politics with a rapidity that no other nation has ever shown. Their

students are great admirers of American governmental forms, and even social forms. There is an immense body of men today in Japan urging a democratic and constitutional government on the model of that of the United States. There is no question but in a brief time their forms of government will be as liberal and democratic as those of England and the United States. They are immensely loyal—loyal to family and loyal to properly constituted government. Those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians. Let me repeat, and I measure my words in so doing, with nearly a half century of study and association with the Japanese, that I am persuaded that they will make as loyal and patriotic American citizens as any that we have."

IX.

No race but the Chinese being excluded from naturalization, the root stocks and the dominant strain of the Japanese being of the white race and being "free," the petitioner can not be excluded on the single ground that he is "one of the Japanese race, born in Japan."

If Section 2169 is applicable, we have shown that it deals with individuals and not with races; that if construed in its original acceptation it means one not of the black race; that like the Polynesian, who are descended from the ancient Japanese, they speak an Aryan tongue and are of the Caucasian race; that the southern Japanese are certainly of the Mediterranean race from which we spring; that while the Japanese are more or less a mixed race, the dominant

type is still Caucasian; that they are a people against whom the naturalization and immigration laws of the United States have never discriminated, and whose fitness for citizenship has never been denied; and that it imputes legislation inconsistent with the policy of the United States expressed in its treaties and its laws and a course of action beneath the dignity of Congress to imply that the Japanese as a race have been excluded by indirection and by inference.

CONCLUSION.

It is due to the court to say that we have inserted as part of our argument the opinions of scientific men not readily accessible in standard works, but this we have done to give the court the latest views of science on the race origin of the Japanese, a race origin in which they are intimately connected with the Polynesians, and the standard works furnish no adequate discussion upon the point in question, the material for the decision of which is now being collected by the men from whom we quote.

In conclusion, we ask this court to give to the great question submitted the informed and discriminating consideration which it deserves but has not yet received, and we confidently hope that such consideration will lead the court to hold that the United States, after extending a hand to welcome to its civilization a great and then well-contented people, did not coldly withdraw that hand, on the ground that they were among the undesirable and outcast of earth.

DAVID L. WITHINGTON,
Attorney for Petitioner.



INDEX.

STATEMENT OF FACTS-----	Page 1
ARGUMENT-----	3
I. Court decisions construing expression "white persons," as used in Naturalization Statutes of United States-----	3
A. Unanimity of Federal and State Appellate Court Decisions holding Japanese not "white persons" and therefore inelig- ible to citizenship in the United States-----	3
B. Chinese, being of the Mongolian or "Yellow" Race, held not entitled to citizenship. This, irrespective of statutory pro- hibition-----	26
C. American Indians held not "white persons," and so, ineligible to citizenship. Are of "Red" Race-----	26
D. Natives of Hawaiian Islands resident in United States held of Malay or "Brown" Race, and not "white persons," and therefore not eligible to citizenship-----	27
E. Syrians held to be "white persons," entitled to naturalization	27
F. Armenians held to be "white persons" and entitled to natural- ization-----	37
G. Hindus held to be "white persons" and entitled to natural- ization-----	39
II. Statutory history of United States Naturalization Statutes, and Court references thereto, show that expression "white persons" was used to exclude the Mongolian-Malay type-----	40
A. The express prohibition by Congress against Chinese natural- ization, has been held by the Courts to have been unneces- sary-----	74
III. The scientific question of the race of the Japanese people. By the overwhelming weight of recognized ethnological and anthropolo- gical authority, the Japanese are of the Mongolian-Malay, or "Yellow-Brown" Race-----	80

	Page
IV. The transcripts in these two cases indicate records which do not permit of argument that possibly petitioners may be of the so-called "Ainu" race, which some authorities believe to be a "white" race	115
V. Conclusion	119

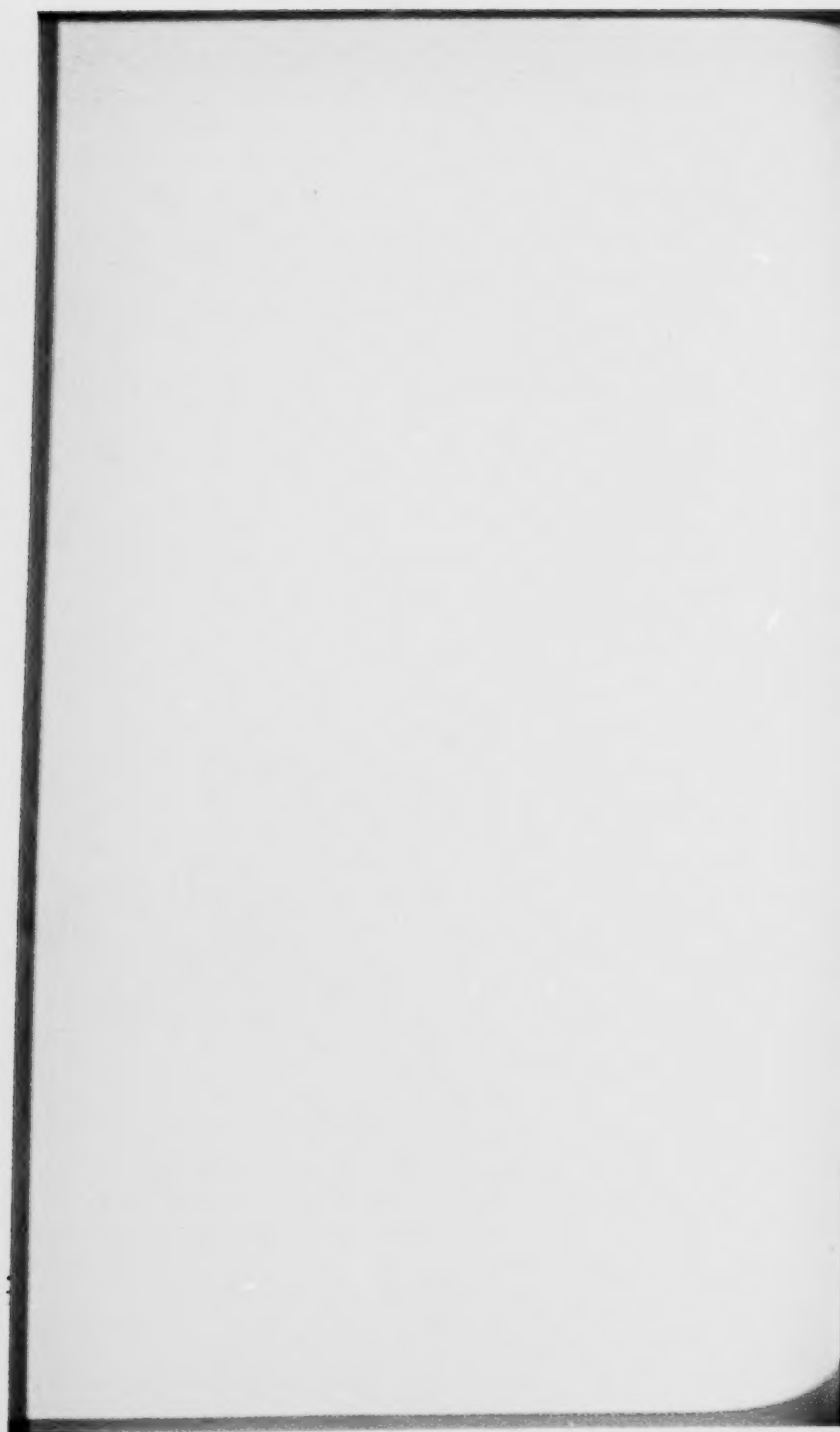
CASES CITED.

Alverto, In re, 232 Fed. 382	20
Bautista, In re, 245 Fed. 765	20
Bessho vs. U. S., 178 Fed. 245	14, 26
Burton, In re, 1 Alaska 111	26
Camille, In re, 6 Fed. 256	26
Charr, Petition of Easurk Emsen, 273 Fed. 207	18, 22
Chong, In re Ah, 2 Fed. 733	80
Dow, Ex parte, 211 Fed. 486	30
Dow, Ex parte, 213 Fed. 355	25
Dow vs. U. S., 226 Fed. 145	27
Elk vs. Wilkins, 112 U. S. 94	26
Ellis, In re, 179 Fed. 1002	67
Halladjian, In re, 174 Fed. 834	37
Hampden County vs. Morris, 207 Mass. 167, 93 N. E. 579	70
Hop, In re Gee, 71 Fed. 274	26
Knight, In re, 171 Fed. 299	12
Kumagai, In re Buntaro, 163 Fed. 922	11, 53
Leichtag, In re, 211 Fed. 681	69
Mallari, In re, 239 Fed. 416	69
Mozumdar, In re Ahkay Kumar, 207 Fed. 115	66
Najour, In re, 174 Fed. 735	27
Nian, In re Kanaka, 21 Pac. 993	27, 79
Ozawa vs. United States, 4 U. S. District Court for Hawaii 671	3
Para, In re Geronimo, 269 Fed. 643	25, 54
Po, In re, 28 N. Y. S. 383	79
Saito, In re, 62 Fed. 126	25
Sato vs. Hall, 34 Cal. App. Dec. 678	25
Singh, In re Mohan, 257 Fed. 200	25, 39
Song, In re En Sk, 271 Fed. 23	24, 53
Thind, In re Bhagat Singh, 268 Fed. 683	40

Ting, Fong Yue vs. U. S., 149 U. S. 698.....	Page 26
U. S. vs. Balsara, 180 Fed. 694.....	17, 39, 54
U. S. vs. Ginsberg, 243 U. S. 472.....	70
U. S. vs. Ness, 245 U. S. 319.....	71
U. S. vs. Peterson, 182 Fed. 289.....	71
U. S. vs. Rodiek, 162 Fed. 469.....	68
U. S. vs. Wong Kim Ark, 169 U. S. 649.....	63
Yamashita, In re Takuji, 70 Pac. 482.....	9, 26
Young, In re, 195 Fed. 645.....	17
Yup, In re Ah, Fed Cas. No. 104.....	52

SCIENTIFIC AUTHORITIES CITED.

Blumenbach	80
Cuvier, Baron (The Animal Kingdom).....	113
Dictionary of Races or Peoples (Senate Document, No. 662).....	106
Figuier (The Human Race).....	112
Gulick, Sidney L. (Evolution of the Japanese).....	112
Hrdlicka, Dr. Ales.....	81
Kuno, Professor Yoshi S.....	94
Nelson's Encyclopedia	114
Prichard, James Cowles (Natural History of Man).....	112
Ratzel (History of Mankind).....	112
Standard Dictionary	115
Senate Document No. 662 (Dictionary of Races or Peoples).....	106
Webster's New International Dictionary.....	114



IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1922.

No. —

TAKAO OZAWA, Appellant, vs. THE UNITED STATES, Appellee.	}
--	---

ON A CERTIFICATE FROM THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FILED BY THE ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA AS AMICUS CURIAE.

STATEMENT OF FACTS.

We are to ask the court for permission to file this brief as *amicus curiae* in the above entitled case, and also that the brief be considered in connection with the other case, which we understand is to be argued at the same time and which is entitled "*Takuji Yamashita and Charles Hio Kono, Petitioners, vs. J. Grant Hinkle, as Secretary of State of the State of Washington, Respondent,*" October term 1922, No. 177.

Each of these cases involves the question of the right of the Japanese to apply for citizenship in the United States. The answer to this question depends upon the soundness of the contention of petitioners that Japanese are "white persons" within the scope of the United States naturalization laws. The people of the State of California, along with the people of the western states generally, are of course vitally concerned in this matter and it shall be our purpose to present an analysis of the law, of statutory history, and of scientific treatises, to show that Japanese are not "white persons" within the contemplation of the United States naturalization laws.

We shall refer to the above entitled case as the "*Ozawa*" case, and to the other case as the "*Yamashita*" case.

In the *Ozawa* case the petitioner was denied citizenship by the United States District Court of Hawaii, because he is of the Japanese race and born in Japan. An appeal was thereupon taken to this court.

In the *Yamashita* case the Supreme Court of the State of Washington denied petitioner a writ of mandate to compel the secretary of state of said state to receive and file articles of incorporation of the Japanese Real Estate Holding Company, for the sole reason that the petitioning incorporators were natives of Japan, although they had been naturalized by a Superior Court of said State of Washington. The action of the defendant secretary of state was

based upon a decision of the Supreme Court of the State of Washington, *In re Yamashita*, 30 Wash. 234. In that case one of these petitioners sought admission to the bar of the State of Washington. The Supreme Court decided that the above described judgment of the Superior Court admitting him to citizenship was void, since he was not a "white person." A writ of certiorari issued to have this decision of the Washington Court reviewed by the Supreme Court of the United States.

ARGUMENT.

I.

COURT DECISIONS CONSTRUING EXPRESSION "WHITE PERSONS," AS USED IN NATURALIZATION STATUTES OF UNITED STATES.

A. UNANIMITY OF FEDERAL AND STATE APPELLATE COURT DECISIONS HOLDING JAPANESE NOT "WHITE PERSONS," AND THEREFORE INELIGIBLE TO CITIZENSHIP IN THE UNITED STATES.

Judge Clemons of the United States District Court for the territory of Hawaii in his decision in the *Ozawa* case, now before the United States Supreme Court, gives a very convincing presentation of the scientific phases of this case. He shows that irrespective of differences of opinion on the question, the great weight of scientific opinion has been that either the Malay or Mongolian or both of these stocks predominate in the Japanese race. He also shows that this weight of scientific opinion, right or wrong, has been recognized as the correct opinion by

our law makers and our courts ever since there was any expression on the subject at all. (Vol. 4, United States District Court for Hawaii, page 671.) As he says at page 673:

“* * * persons of the Oriental races or of the so called ‘yellow races’ * * * have at all times under accepted classifications been regarded as ethnologically distinct from the white race.”

At page — the court says:

“* * * no reported case is known in which a person of the Japanese race has been naturalized, in which the court has rendered a written opinion to justify its ruling or in which there has been a contest to evoke the most thorough consideration.”

At page 30ff the court continues:

“* * * it is of most practical importance to bear in mind that the ethnological divisions which classed the Japanese as of the Mongolian or yellow race, were what the legislators of 1875 and the courts thereafter down even to the present have had to rely upon as their guides. See quotation in *In re Ah Yup, supra* (1878), from Webster’s Dictionary, probably the most widely circulated work in America except the Bible, and even the very recent edition of the Encyclopedia Britannica, 11th ed., vol. 9, page 851. This classification was undoubtedly well known in this country early in the last century, as it was in Germany before 1790, the date of the original enactment of the statute. Even if, as the petitioner contends, Blumenbach’s classification is unscientific (see

In re Dow, 213 Fed. 355, 358, 359, 365; *In re Mudarri*, 176 Fed. 466, 467), nevertheless it has not yet been superseded so far as to assimilate the Japanese with what for many years, at least as early as 1854, and especially before 1875, has been generally regarded as the 'white' race.

Tylor, one of the highest authorities, in his book of 1881, 'Anthropology' (Appleton's ed. 63, 96-98), points out that the Japanese have characteristics of the 'Mongoloid type of man' in which one prominent feature is that "their skin is brownish yellow." The most recent encyclopedic authority, 9 Enc. Britt. 11th ed. (1910), 851, classes the Japanese as Mongolic or yellow, though placing the Ainos, a small element of the people of Japan, as Caucasian or white. See also 15 Id., 165. In addition to this unobstructed current of authority reference may be had to a very late work, 'A History of the Japanese People,' by Captain F. Brinkley, included by Dr. William Elliot Griffis in a list of the English scholars who 'have made obsolete most of the old European learning about Japan.' 'The Japanese Nation in Evolution,' 20.

"The Japanese are of distinctly small stature
* * * Their neighbors, the Chinese and the Koreans, are taller * * * Nevertheless, Professor Dr. Baelz, the most eminent authority on this subject, avers that 'the three great (36) nations of Eastern Asia are essentially of the same race,' and that observers who consider them to be distinct 'have been misled by external appearances.'" Brinkley, History, etc. *supra*, 57-58, see also 59, 60. That the Japanese have, however,

an element of white, Caucasian or Iranian, blood is noted. Id. 58, see also 45, 54, 55.

Another recent book may be quoted as giving the opinion of a Japanese educator, "The Life and Thought of Japan," by Okakura Yoshisaburo (published by E. P. Dutton & Co., 1913):

"And as to those swarms of immigration from China and Korea, who crossed the sea at various periods in the early days of Japanese history, it did not take many generations before they came to adopt the views of the people with whom it was their interest in every way to get mixed, and thus they lost their own identity. In this manner, notwithstanding an extensive admixture of foreign elements to our original stock, we find ourselves as closely unified a nation as if we had been perfectly homogeneous from the very beginning. One and the same blood is felt to run through our veins, characterized by one and the same set of religious and moral ideas. This may perhaps be due to the fact that the three elements—the conquering, the conquered, and the immigrating—belonged originally to the same Mongolian race, with very little trace of any mingling of Ainu and Malayan blood." Id. 48, 49.

"You will come at least to some extent, to acknowledge the truth of the statement so often made in books on Japan, that there are two distinct racial face-types among the present Japanese * * * Be it remembered that both these types are Mongol. Both have the yellowish skin, the straight hair, the scanty beard, the broadish skull, the more or less oblique eyes, and the somewhat high cheekbones, which characterize all well-established branches of the Mongol race." Id. 41.

“The relation here displayed between the living and the departed may be considered as a characteristic of the Mongolian race to which both the Japanese and the Chinese belong.” Id. 54.

Whether these views just quoted are wholly accurate or not, I do not undertake to say. They are at all events, in line with the statements of scientific works which have been, as already intimated, the guides of our courts in all cases known to have been contested or in which the Court rendered a written opinion—even though recognizing that there is in the Japanese an element of white blood. See reference to Brinkley, *supra*.

Dr. Griffis' interesting book, in a broad spirit of tolerance, notable in one for forty years in the closest touch with Japan, and for some years a resident there, goes far to demonstrate the conclusion that “the Japanese are not Mongolian.” “The Japanese Nation in Evolution,” 400. Rev. Dr. Doremus Scudder, of Honolulu, who is himself intimately acquainted with the Japanese people, and who may be termed a friend of the court, has submitted in behalf of the petitioner this authority as tending at least to support the view that the Japanese are “white persons” even in a narrow sense of those words. But Dr. Griffis, after all, does not seem to be at variance with the common authorities on ethnology. It is plain that he is speaking of the later development of the Japanese away from all that is narrow in the sense of “Mongolic,” or “Oriental,”—of their “both deserving and winning success,” Id. 400, in competition, or rather comparison, with the most progressive and enlightened peoples of the world.

He recognizes the Mongolic element constantly. "White men, belonging to the great Aryan family and speaking a language akin to the Indo-Germanic tongues, were the first 'Japanese,' who are a composite and not a pure 'Mongolian' race. Their inheritance of blood and temperament partakes of the potencies of both Europe and Asia." Id. 1, also 21, 25, 349. He also recognizes the Malay element, which, at least "the Malay peoples of the Eastern archipelago,"—the last edition of the Encyclopedia Britannica includes in the Mongolic or yellow division of the races, though "less typical" but with the "Mongolic elements so predominant as to warrant inclusion." Says Dr. Griffis, Id. 30, "Those most familiar with the races, the Mongol, Aryan and the Malay, now so differentiated, consider that in the Nippon composite the Malay strain predominates."

Also Id. 30-31, et seq. Though Dr. Griffis believes that "the basic stock of the Japanese people is Ainu" (a white people) * * * "by 'basic stock' * * * mean(ing) the oldest race in the islands" (Id. 5, also 1), yet he speaks of the Ainos as having been "crowded out" (Id. 9)—elsewhere characterizing the process as absorption not elimination (Id. 26); and Brinkley, History, etc., *supra*, 56 (see also 44), notes the "steady extermination for twenty-five centuries" of the Ainu element, characterized by him as having "left as little trace in the Japanese nation," Id. 58."

In re Takuji Yamashita, 70 Pac. 482. In this case the Supreme Court of Washington held that a Japanese was not entitled to be admitted as a citizen of the United States, and for this reason citizenship papers granted to him by the Superior Court of the State of Washington were void. He was therefore denied admission as an attorney and counselor at law in the courts of said state. It was this action of the Supreme Court of the State of Washington which serves as the basis of the respondent, Secretary of State of the State of Washington, in the *Yamashita* case now before this court, refusing to receive and file articles of incorporation of the Japanese Real Estate Holding Company, prepared and executed in conformity with the general corporation laws of that state; the incorporators named in the said articles of incorporation being natives of Japan, although naturalized citizens of the United States. At page 482 of the Pacific Reporter the Supreme Court of Washington says:

“The question presented is whether one of the Japanese race is eligible under the naturalization laws for admission to citizenship.”

“It is plain that the two races mentioned (in section 2169 R. S.) are now eligible to citizenship under the general naturalization laws; that is, white persons and persons of African (negro) descent and nativity. It is clear that within the meaning of these words the applicant is ineligible. When the naturalization law was enacted the word ‘white,’ applied to race, commonly referred to the

Caucasian race. This is well stated in the case of *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; Webster, in his dictionary, says: 'The common classification is that of Blumenbach, who makes five: (1) The Caucasian or white race, to which belong the greater part of the European nations and those of Western Asia; (2) the Mongolian or yellow race, occupying Tartary, China, Japan, etc.; (3) the Ethiopian or Negro (black) race, occupying all Africa, except the north; (4) the American or red race, containing the Indians of North and South America; and (5) the Malay or brown race, occupying the islands of the Indian Archipelago,' etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: '(1) European, whitish; (2) American, coppery; (3) Asiatic, tawney; and (4) African, black.' Cuvier makes three: 'Caucasian, Mongol, and Negro.' Others make many more, but not one includes the white or Caucasian with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race. See New Am. Cyc. tit. 'Ethnology.' "

At page 483 the Supreme Court of Washington further says:

"*In re Saito*, 62 Fed. 126, the federal circuit court adjudged that a native of Japan was of the Mongolian race, and therefore not eligible to naturalization."

In re Buntaro Kumagai, 163 Fed. page 922. In this case the District Court for the Western District of Washington stated as follows:

“This applicant for naturalization is an educated Japanese gentleman, and, in support of his petition to be admitted to citizenship, he presents a certificate showing that at the expiration of a term for which he enlisted as a soldier in the regular army of the United States, he was honorably discharged. * * *”

“The general policy of our government in regard to the naturalization of aliens has been to limit the privilege of naturalization to white people, the only distinct departure from this general policy being soon after the close of the Civil War, when, in view of the peculiar situation of inhabitants of this country of African descent, the laws were amended so as to permit the naturalization of African and aliens of African descent. In the year 1862 (Act July 17, 1862, c. 200, Sec. 21, 12 Stat. 597) a law was enacted in recognition of services of aliens who enlisted in the military service of this country, authorizing naturalization of aliens who should be honorably discharged from military service and that law became incorporated in title 30 of the Revised Statutes of the United States as section 2166 (U. S. Comp. St. 1901, p. 1331). As originally enacted by Congress, section 2169 merely extended the privilege of naturalization to Africans and aliens of African descent, but by the act of 1875, to correct

errors and supply omissions in the Revised Statutes, that section was amended to read as follows:

‘The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.’ Act Feb. 18, 1875, c. 80, 18 Stat. 318 (U. S. Comp. St. 1901, p. 1333.)

As both sections are comprised in title 30, this amendment of section 2169 provides a rule of construction applicable to section 2166, and, being the latest expression of the will of Congress on the subject, it is controlling, and limits the privilege of naturalization to white persons and those of African nativity or descent. The use of the words ‘white persons’ clearly indicates the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country. *In re Ah Yup*, Fed. Cas. No. 104; *In re Saito* (C. C.) 62 Fed. 126; *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860.

As this applicant is of a different race, the court is constrained to deny his application on the ground that the laws enacted by Congress do not extend to the people of his race the privilege of becoming naturalized citizens of this country.” (Pages 923-924.)

In re Knight, 171 Fed. 299.

In this case, decided in 1909, the U. S. District Court, East District of New York, denied application for naturalization to the applicant, who was honorably discharged from the United States Navy and

who claimed the right to naturalization under the terms of the act of July 26, 1894, Chap. 165, 28 Stat. at L. 124, which gave such right to any alien of the age of twenty-one years and upward who had enlisted in the United States Navy or Marine Corps and served five consecutive years in the United States Navy and had been honorably discharged, which right was given without any previous declaration of his intention to become a citizen of the United States.

(See note Fed. Stat. Ann., Vol. 6, page 1004.)

The court said that his record in the Navy was more than sufficient to meet the requirements of this act of July 26, 1894. Knight enlisted off the coast of China upon the *Monocacy*. It appeared that he was born upon a schooner flying the British flag, in the Yellow Sea, off the coast of China; that his father was of English birth and parentage; that his mother was one-half Chinese and one-half Japanese, having been married to the applicant's father at Shanghai, under the British flag. The court says:

"The court is entirely satisfied as to the applicant's intelligence and character, and the only question arises under the provisions of section 2169 of the Revised Statutes (U. S. Comp. St. 1901, p. 1333) viz.:

'This title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.'

A person of the Mongolian race, either Chinese or Japanese, can not be naturalized, even

with honorable service in the army or navy (*In re Buntaro Kumagai* [D. C.] 163 Fed. 922),

* * * * *

A person, one-half white and one-half of some other race, belongs to neither of those races, but is literally a half-breed."

Bessho vs. United States, 178 Federal 245. In this case the Circuit Court of Appeals, for the Fourth Circuit, decided that a Japanese was not entitled to citizenship papers, although he made a showing under the act of July 26, 1894, granting to aliens who have enlisted in the United States Navy and served for five years and been honorably discharged therefrom, the right to citizenship without any previous declaration of intention.

The court based its decision on the language of section 2169 Revised Statutes, limiting citizenship rights to those who are free white persons. Referring to this language the court said at page 246:

"The attention of the legislative branch of the government was thus particularly called to the point we are now considering, and the action then taken by it is most significant, and clearly indicates that the Congress then intended to exclude all persons of the Mongolian race from the privileges of the naturalization laws."

Here we see the court treating Japanese as of the Mongolian race. At page 248 the court reviews the

history of the naturalization acts of Congress as follows:

“A careful examination of the statutes relating to naturalization, commencing with act Cong., April 14, 1802, c. 28, 2 Stat. 153, and ending with the enactment of July 14, 1870, c. 254, 16 Stat. 254, discloses the fact that such statutes during all that time had in view the purpose of preventing all aliens, not free white persons, from becoming citizens of the United States; in other words, all alien races except the Caucasians were excluded. From and including the act of July 14, 1870, to and inclusive of the act of June 29, 1906 (except the period between the revision of 1873, and the amendments thereof of 1875), the intention was to exclude from naturalization all aliens except those of the Caucasian and the African races. The history of the country through all the time thus indicated—to which we think we may with propriety allude—clearly develops the necessity for the legislation mentioned, and points out the purpose of the Congress in enacting it.”

The court considers the argument which was urged that inasmuch as the act of May 6, 1882 (22 Stats. 61), expressly prohibited Chinese from rights of citizenship, the Congress did not intend to prevent other aliens of the Mongolian race from being naturalized. The court says:

“We are unable to agree to this view of that act. The section referred to was evidently incorporated in the act mentioned to dispel a doubt

entertained in some sections as to the sufficiency of the legislation on the subject of naturalization then in force, to prevent Chinese from being admitted as citizens. The title of the act is 'An act to execute certain treaty stipulations relating to Chinese,' and the preamble reads as follows:

'Whereas in the opinion of the government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof.'

The fourteenth section reads thus:

'That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.'

Surely there can be no serious contention concerning the ineligibility of Chinese to be naturalized under the statutes existing when this act became a law. The courts had theretofore considered such applications and rejected them. *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Camille* (C. C.) 6 Fed. 256. The Supreme Court, in *Fong Yue Ting vs. U. S.*, 149 U. S. 698, 716, 13 Sup. Ct. 1016, 1023 (37 L. Ed. 905), said:

'Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws.' "

The court is therefore of the opinion that without this express prohibition Chinese were ineligible to citizenship.

The United States Circuit Court of Appeals, Second Circuit, in the case of *United States vs. Balsara*, 180 Fed. 694, at page 696, indicates its conclusion that a Japanese is not a member of the white race in the following language:

“We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race.”

In re Young, 195 Fed. 645. In this case the United States District Court of Washington, Judge Hanford writing the decision, held that an applicant for naturalization who was born in Yokohama, Japan, under the dominion of the empire of Germany and a subject of the emperor of Germany, whose father was a German and mother a Japanese, could not be naturalized because not a white person or of African nativity or descent. At page 646 the court said:

“The right to become a naturalized citizen of the United States depends upon parentage and blood, and not upon nationality or status.”

A rehearing in this case was denied by the same court in 198 Fed., at page 715, Judge Cushman writ-

ing the decision. At pages 716 and 717 the court said:

“It is just as certain that, whether we consider the Japanese as of the Mongolian race, or the Malay race, they are not included in what are commonly understood as ‘white persons.’ In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it can not be said that one who is half white and half brown or yellow is a white person, as commonly understood. * * * It is not necessary to determine the exact status of the petitioner. All that is necessary is to determine whether he is a ‘white person’ within the meaning of the law.”

The United States District Court in Massachusetts in 1916, in *In re Mallari*, 239 Fed. 416, disapproved of the rule of *In re Alverto* decided by the United States District Court in Pennsylvania, in 1912, to the effect that section 30 of the naturalization act of 1906 must be read in connection with section 2169 of the Revised Statutes, and that therefore a Filipino, one not of the white race or of African nativity or descent, is not entitled to naturalization. We have, however, the still later decision of 1921 by the United States District Court in Missouri, *Petition of Easurk Emsen Charr*, 273 Fed. 207, where the earlier rule of *In re Alverto* is approved of. This later decision dealt with a Japanese and held that he was not a “white person” and therefore could not claim

the right to naturalization under the provisions of subdivision 7 of section 4 of the act of June 29, 1906, as amended by the act of May 9, 1918 (Compiled Statutes 1918, Compiled Statutes Annotated Supp. 1919, Section 4352), and by the subsequent act of July 19, 1919 (41 Statutes 222). These recent acts extended certain privileges of naturalization to those who had served in the United States military or naval forces. At pages 211 and 212 the court said:

“Incidentally it has been urged that section 2169 was repealed, by implication, by the act of June 29, 1906 (34 Stat. 596). The contention has uniformly been rejected, and, notably, in cases involving Filipinos. *In re Alverto* (D.C.) 198 Fed. 688; *In re Rallos* (D.C.) 241 Fed. 686; *In re Lampitoe* (D.C.) 232 Fed. 382; *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660. The act of June 29, 1906, provided that the naturalization laws shall apply to authorize the admission to citizenship of all persons not citizens who owe allegiance to the United States, and who may become residents of any state or organized territory of the United States, on certain conditions. This was done to make possible the naturalization of citizens of the Philippine Islands and of Porto Rico, who were theretofore generally excluded because, first, the naturalization laws of the United States applied only to aliens, and, second, they required a renunciation of former allegiance. It was contended that this provision of the act of 1906 removed the inhabitants of those islands from the limitation of section 2169. A native of the Philippine Islands applied for citizenship

upon that ground. Ethnologically he was found to be one-fourth white and three-fourths brown or Malay. His application was denied for the reason that he was not a white person, and section 2169 controlled and limited the provisions of the act of 1906 as part of the general naturalization statute of the United States. *In re Alverto, supra.*”

In re Alverto is followed by the United States District Court in New York in *In re Lampitoe* decided in 1916 (232 Fed. 382). The court there decided that the son of a Filipino mother and a father who was half Filipino and half Spanish was not a white person and therefore not entitled to naturalization. The court said:

“The case falls exactly within *In re Alverto*, 198 Fed. 688, and needs no other consideration. * * *”

In *In re Bautista*, 245 Fed. 765, District Court of California, decided on November 5, 1917, Circuit Judge Morrow held that under the naturalization act of 1906, section 30, a native Filipino of the Malay race owing allegiance to the United States, is entitled to naturalization. The applicant for naturalization was born under Spanish rule and was therefore an alien. He was a Malay. Judge Morrow gives a very good discussion of the debates in Congress and the statutory history, from the court's point of view, leading to the conclusion that section 30 was intended to grant this right to Filipinos owing allegiance to the

United States. It was necessary to pass on the point of his having been born an alien, because the claim for naturalization was made under the act of June 30, 1914, providing that certain aliens who have served in the United States navy or marine corps may be naturalized without a previous declaration of intention. Judge Morrow follows the rule of *In re Rallos*, 241 Fed. 686; *Monico Lopez*, Naval Digest 916, p. 207, and *In re Mallari*, 239 Fed. 416. A good discussion of the cases and opinions of the United States Attorney General is included in this decision.

It would appear that the most recent expression of a United States District Court is to the effect that citizens of the Philippines or Porto Rico must be of the white race before they can avail themselves of the privileges of section 30.

- We have been advised that the real purpose of those who drafted section 30 was to protect white persons of Porto Rico and the Philippines.

It is not, however, necessary to consider this question further, as it is not before the court at this time. Whatever may be the rights of Filipinos or Porto Ricans under section 30 of the act of 1906, those rights accrue only when such persons "become residents of any state or organized territory of the United States," such individuals being "persons not citizens who owe permanent allegiance to the United States."

They do not owe allegiance to any foreign sovereignty and therefore under the terms of said section

30 "shall not be required to renounce allegiance to any foreign sovereignty."

The section in no way relates to Japanese owing allegiance to the Mikado of Japan and not "owing permanent allegiance to the United States."

The very most that can be said for section 30 is that it was adopted to protect Filipinos and Porto Ricans coming to the United States, even though they be of the Malay race, and who, because of their peculiar position as citizens of Porto Rico or the Philippines, owe permanent allegiance to the United States and no allegiance to any foreign sovereignty. And, as we have seen, some recent federal court decisions would limit even this right to citizens of the Philippines or of Porto Rico of the white race.

The *Petition of Easurk Emsen Charr*, United States Court, Western District of Missouri, decided April 16, 1921, and on rehearing June 6, 1921, 273 Fed. 207.

This case decided that a native of Korea owing allegiance to and a subject of the Mikado of Japan, a resident of Missouri, was not a "free white person," and therefore could not claim the right to naturalization under the provisions of subdivision 7 of section 4 of the act of June 29, 1906, as amended by the act of May 9, 1918 (Compiled Statutes 1918, Compiled Statutes Annotated Supplement 1919, section 4352), and by the subsequent act of July 19, 1919 (41 Statutes, 222). These recent acts extended certain privileges of naturalization to those who had served in the United States military or naval forces,

and admitted them to citizenship without many of the other proceedings and strictness of proofs which were provided and enforced under the law affecting naturalization generally. The court held that these recent enactments did not modify the rule as set forth in section 2169 of the Revised Statutes, which limits the right to naturalization to free white persons and to aliens of African nativity and to persons of African descent. At pages 209 and 210 the court says:

“(1) The meaning of section 2169 has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. *In ex parte Dow* (D. C.) 211 Fed. 486, and *In re Dow* (D. C.) 213 Fed. 355, it was held that the words do not mean a person white in color, nor do they designate racial distinction, meaning Caucasian or Indo-European, but are to be construed rather as a geographical term, referring to the people who were commonly known in the United States as those inhabiting Europe, and whose descendants, at the time of the passage of the act of 1790 (1 Stats. 103), formed the inhabitants of the United States, excluding Africans. In those cases, a Syrian from the Lebanon district—that is to say, from that part of the Mediterranean coast in Asia occupied in the ancient times by Phoenicians—was denied admission to citizenship upon the ground that he was not a free white person within the meaning of section 2169. The holding in those cases was rejected by the Circuit Court of Appeals for the Fourth Circuit in the same entitled case. 226 Fed. 145, 140 C. C. A. 549.

In accordance with numerous holdings the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow and brown races.

"Whether or not historically the term 'Caucasian' is accurate as a designation of the white race, it is a term which appeals to common understanding and to that of the lawmakers with practical definiteness, and the term 'white person' may now be said to have a well understood meaning. In the case at bar we are not troubled by close refinements of definition, either as to race, color, or geographical location. The petitioner is a Korean, admittedly of the Mongol family. Whatever their precise shade of color may be defined to be, they are confessed not white persons, either in fact or in accordance with common understanding, and they are about as far removed from Europe and the Mediterranean Sea as could well be imagined."

In the case of *In re En Sk Song*, 271 Fed. 23, it was held by United States District Judge Bledsoe, Southern District of California, that a native of Korea was a member of the Mongolian race, and therefore not "a free white person," and so not eligible to naturalization.

See also, for Japanese cases:

Ex parte Dow, 213 Fed. 355 at 356, *infra*;

In re Mohan Singh, 257 Fed. 209 at 212, *infra*;

In re Saito, 62 Fed. 126, *infra*;

In re Geronimo Para, 269 Fed. 643, *infra*;

Ichizo Sato vs. Harry W. Hall, Clerk to the County of Sacramento, 34 Cal. App. Dec. 678.

In this case the District Court of Appeal of the State of California, Third Appellate District, decided that an order of the United States District Court of the territory of Hawaii admitting to citizenship a native of Japan is void on its face, where it recites that the person admitted is a member of the yellow race. It also decided that a member of the yellow race and native of Japan, who served in the United States army in the late war, is not entitled to naturalization under subdivision 7 of section 4 of the act of Congress of May 9, 1918, (Supplement of 1918, to Fed. Stat. Annotated, p. 488), which provides that "any alien" who served in the army or navy during the recent war is entitled to naturalization, since the act must be read in connection with section 2169 of the Revised Statutes. At the time of the admission of Saito to citizenship he was a subject of the Emperor of Japan. At page 679 the court said:

"Members of the Japanese race have never been held to be members of the white race and still less are they members of the black race. Waiving any extended inquiry into the chromatic classifications of the human race, it is sufficient to say that, under the Blumenbach and all later

classifications, the members of the Japanese family have always been classed as yellow in color—by the former as belonging to the Mongolian race and by the latter as the Ural-Altaic. But by no authority have they ever been classed as Caucasian.”

This case gives a very clear and exhaustive analysis of the different acts of Congress extending privileges to aliens who have served in the United States army or navy.

B. CHINESE, BEING OF THE MONGOLIAN OR “YELLOW” RACE, HELD NOT ENTITLED TO CITIZENSHIP. THIS, IRRESPECTIVE OF STATUTORY PROHIBITION.

Fong Yue Ting vs. United States, 149 U. S. 698, at 716;

In re Gee Hop, 71 Fed. 274.

See

In re Yamashita, 70 Pac. at 482;

Bessho vs. United States, 178 Fed. 245.

C. AMERICAN INDIANS HELD NOT “WHITE PERSONS,” AND SO, INELIGIBLE TO CITIZENSHIP. ARE OF “RED” RACE.

In re Burton, 1 Alaska 111.

In this case the District Court of the Territory of Alaska held that an Indian born in British Columbia is not eligible to citizenship by naturalization in the United States because he was not a white person.

See also

In re Camille, 6 Sawy. 541, 6 Fed. 256;

Elk vs. Wilkins, 112 U. S. 94.

D. NATIVES OF HAWAIIAN ISLANDS RESIDENT IN UNITED STATES HELD OF MALAY OR "BROWN" RACE, AND NOT "WHITE PERSONS," AND THEREFORE NOT ELIGIBLE TO CITIZENSHIP.

In re Kanaka Nian, 21 Pac. 993.

In this case the Supreme Court of Utah denied to a native of the Hawaiian Islands whose ancestors were Kanakas the right to citizenship in the United States. The court states that the highest authorities claim the Hawaiians as among the Malay tribe and that no authorities upon such subjects classify them with either the Caucasian or the Ethiopian or black race.

E. SYRIANS HELD TO BE "WHITE PERSONS," ENTITLED TO NATURALIZATION.

In the case of *In re Najour*, 174 Fed. 735, the United States Circuit Court of Georgia decided that a Syrian was entitled to naturalization because he belonged to the white race. At page 735 the court said:

"Although the term 'free white person' is used in the statutes (Rev. St. Sec. 2169 U. S. Comp. St. 1901, p. 1333), this expression, I think, refers to race, rather than to color, and fair or dark complexion should not be allowed to control, provided the person seeking naturalization comes within the classification of the white or Caucasian race, and I consider the Syrians as belonging to what we recognize, and what the world recognizes, as the white race."

In *Dow vs. United States*, 226 Fed. 145, the Circuit Court of Appeals for the Fourth Circuit

reversed the decisions in the District Court reported in 211 Fed. 486 and on rehearing at 213 Fed. 355. The Circuit Court of Appeals decided that a Syrian coming from that part of Southwestern Asia immediately adjoining the eastern coast of the Mediterranean Sea was a white person. At pages 146 and 147 the court says:

“In 1790, when the first act was passed, immigration to this country was almost altogether from Europe; and doubtless the act of 1790 was intended mainly to provide for naturalization of aliens from Europe, and to deny naturalization to negroes. With other peoples this country had little intercourse and little concern. Accordingly the records of Congress indicate that the debates on the bill of 1790 related to European immigration. It is reasonably certain that congressmen had no knowledge of Blumenbach’s classification of the races of men published in 1781, in which he makes one of the divisions the white or Caucasian race and includes in it ‘the western Asiatics on this side of the Caspian Sea and the Ganges’; for his work was not translated from the German and published in English until 1807. The science of ethnology had made little advance in 1790, and the notion of racial division and the meaning of the term ‘white’ in a comprehensive sense as applied to men were probably quite vague and indefinite in the minds of legislators. Yet in not mentioning the people of Europe, and in extending the privilege of naturalization to any ‘free white person,’ it seems reasonable to think that the Congress must have believed that there were

white persons natives of countries outside of Europe. The writers on the subject of that day, to say the least, were not agreed in the view that Europeans were the only white people.

“If it be assumed, however, that the preponderance of the argument is strongly in favor of the conclusion that in 1790 the popular understanding was that people of European nativity or descent were white, and that all others were colored, and that legislators had not in definite view any persons as white, except those of European nativity or descent, that would not be conclusive of the construction to be given to the present statute. The popular conception of race division became more distinct as time went on. Blumenbach’s work probably became known in this country soon after 1807, when it was published in English; and his division, though the basis of it is now discarded, seems to have been that generally accepted. The opinions of later writers are in accord with Blumenbach’s that Syrians are to be classed as white people. Pritchard, *Natural History of Man*, 1848; Pickering, *Races of Man*, 1851; Figuier, *The Human Race*, 1872; Jeffries, *Natural History of the Human Race*, 1869; Brinton, *Races and Peoples*, 1901; Keane, *World’s Peoples*, 1908. In the *Dictionary of Races*, contained in the Reports of the Immigration Commission, 1911, it is said:

‘Physically the modern Syrians are of mixed Syrian, Arabian, and even Jewish blood. They belong to the Semitic branch of the Caucasian race, thus widely differing from their rulers, the Turks, who are in origin Mongolian.’

“We have, then, this condition: That in the numerous reconsiderations of the statute, when it was amended or repealed and re-enacted, the Congress must have been aware that certain Asiatics, near the Mediterranean Sea, including Syrians, were generally classed as white people. It seems to follow that, even if the Congress of 1790 considered that the law of that year would be understood to allow the naturalization of persons of European nativity or descent only, the legislators of later years could not have supposed that the term ‘free white persons’ would carry that restricted meaning. This growth of popular and legislative conception of the meaning of ‘free white persons’ from 1790 to 1875, the date of the last enactment on the subject, is the controlling factor in ascertaining the meaning legislators intended should be given to the words as they stand in the present law.”

The case of *ex parte Dow* was originally reported in 211 Federal, 486. A rehearing was granted and the same conclusion reached by the United States District Court, East District of South Carolina in 213 Fed. 355. This decision was reversed by the United States Circuit Court of Appeals for the Fourth Circuit in *Dow vs. United States*, reported in 226 Federal, at page 145.

The decision of the District Court was to the effect that a Syrian, native of Syria in Southwestern Asia near the eastern coast of the Mediterranean was not a “free white person” and was therefore not eligible to naturalization in the United States under the

language of section 2169 of the Revised Statutes. District Judge Smith in his two opinions went into the question of the history of the Syrian people very exhaustively. He does not base his conclusion on the assumption that a Syrian was not a white person from a racial or ethnological standpoint, but rather that the proper construction of the original naturalization act of 1790 must lead to the conclusion that the framers of that act had in mind geographical, rather than racial considerations. He points out that at the time of Blumenbach's classification of the races of men published in 1781, in which he makes one of the divisions the white or Caucasian race and includes in it "western Asiatics on this side of the Caspian Sea and the Ganges," this authority could not have been known to the members of Congress in 1790, as this work was not translated from the German and published in English until 1807.

Judge Smith determined first that "free white persons" could not mean necessarily white in color inasmuch as such a definition had been rejected by the great weight of authority and the decisions of the United States Courts, and that it had been held that the right of an applicant for citizenship is not to be determined by the question of whether upon ocular inspection he may, in the opinion of the judge, be actually white in color.

Second, the judge decided that the definition is not racial solely and that "white" is not to be interpreted as meaning Caucasian, so-called, or Indo-European.

On this branch of the subject the judge discussed the philological phase of the matter with reference to languages spoken by the people theretofore denominated Caucasian. He pointed out that many peoples speaking one of the dialects of the Indo-European language, as for instance, such a branch as Sanscrit, could not be considered racially as whites; that is, in many instances the Aryan or Indo-European language would be imposed upon a conquered people by their conquerors, and in other cases the conquerors spoke the language of those whom they conquered. There would, therefore, be great uncertainty in tracing a race solely by the language of that race.

The judge then took up the third phase of his discussion, the geographical one, and drew the conclusion that by the use of the word "white" in the statute in the year 1790 the Congress undoubtedly was referring to peoples then commonly known in this country as peoples inhabiting Europe whose descendants at that time formed the inhabitants of the United States, excluding of course from such consideration the African descendants who were slaves. He held that "white" was used in the sense of European, which would include many people who would not come within the definition of "Caucasian" or "Indo-European." The only point decided was that the Syrian applicant

"is not that particular free white person to whom the act of Congress has donated the privi-

lege of citizenship in this country with its accompanying duties and responsibilities.

“In donating this privilege the people of the United States have seen fit under the description of free white persons to restrict the privilege as extended to such foreigners to persons of European habitancy and European descent. The applicant being an Asiatic does not come within the terms of the statute, and whatever may be his other qualifications, Congress has not seen fit to endow him with the right to be admitted a citizen of the country.”

In the decision rendered on rehearing the same points were made by Judge Smith. At page 357 of 213 Federal Reporter the judge said:

“The previous decision in this case was that the term ‘white persons,’ as used in the statute, meant persons of European nativity or European descent. The applicant was excluded because he was an Asiatic and not an European. Whether he belonged to a white race or not was not decided as not pertinent to the issue.”

The court, at page 356, indicated that it did not consider Japanese as entitled to citizenship, in the following language:

“That this (the privilege of citizenship) should be refused to him is no real ground for humiliation. Congress has admittedly seen fit to exclude from that privilege Chinese, Japanese, Malays, Mongols generally, and American Indians. It is no more a humiliation for a Syrian to be excluded

from a privilege (not a right) than it is to an educated and cultivated person from China, Japan, or the Malay Peninsula."

At page 358 and following the court gives an interesting discussion on the origin of the expression "Caucasian" as follows:

"The term 'Caucasian' in its application to race originated with one Blumenbach, who in 1781 published in German a work attempting to classify the races of mankind in which he classed as 'Caucasian' the inhabitants of Europe and of the Caucasus and of Asia Minor, Western Asia including Syria, and of Northern Africa.

"Blumenbach determined his classification neither by complexion nor by philological or scientific ethnological principles as now understood. He put together as one race in his own words 'altogether the inhabitants of the world known by the ancient Grecians and Romans.' The peoples possessing according to Blumenbach 'according to European ideas of beauty the form of the face and skull most perfect.' For the designation 'Caucasian' he was indebted to the following circumstances:

" 'Of all the odd myths that have arisen in the scientific world, the 'Caucasian mystery' invented quite innocently by Blumenbach is the oldest. A Georgian woman's skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as derivations; and out of this, by some strange intellectual hocus-pocus, grew up

the notion that the Caucasian man is the prototype 'Adamic' man and his country the primitive center of our kind.' Huxley, *Methods and Results of Ethnology* (Ed. of 1894).

"Or as said by Latham:

" 'Blumenbach had a solitary Georgian skull and that skull was the finest in his collection, that of a Greek being the next. Hence it was taken as the type of the skull of the more organized division of our species. More than this, it gave its name to the type and introduced the term Caucasian. Never has a single head done more harm to science than was done in the way of posthumous mischief by this well-shaped head of a female from Georgia.' Latham, 'The Nationalities of Europe.'

"The scientific conclusion of scholars of the present day is that the inhabitants of the Caucasus are to be classed with the Mongols, and not with the Europeans, so that Blumenbach derived his term from a skull more likely to have been Mongolian than European, or it may be the skull of some traveler or captive in the Caucasus.

"The ill chosen name of Caucasian invented by Blumenbach in allusion to a South Caucasian skull of especially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays who are set down as two distinct races.' E. B. Tylor in article on Anthropology, *Encyclo. Brit.* (11th Ed.)."

There then follows an interesting philological study and in particular with reference to all persons speaking or having spoken one of the so-called Aryan tongues, that is one of the Sanscrit, Iranian, Slavonic, Gothic, Celtic, Latin, Greek group of languages, which persons were generally recognized, if that test were applied, as belonging to the white race. The court explains how such a sole test would lead to absurd results. The court also shows how Blumenbach, who does not appear to have known either the Sanscrit or Iranian tongues, based the origin of the white race as in the Caucasus Mountains, which range of mountains stretches along Southeastern Russia from the Black Sea to the Caspian Sea. This would make the origin of the white race in Southwestern Asia. The term "Aryan" has been succeeded largely by the term "Indo-European." The successors of Blumenbach removed the origin of the white race to the Hindoo-Koosh-Pamir region or in the region of Northern India. Latham attempted to place it on the Sarmatian Plain west of the Volga.

At page 366 Judge Smith sums up his conclusion as follows:

"Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them? If he is, he is entitled to naturalization if he be otherwise fit for it. If he is not, if he is an Asiatic, whether Chinese, Japanese, Hindoo,

Parsee, Persian, Mongol, Malay, or Syrian, he is not entitled to the privilege of naturalization, no matter what his fitness otherwise may be."

The basis for the reversal of this judgment, which we find in *Dow vs. United States*, 226 Fed. 145, is that while the Congress in 1790 doubtless considered the expression "free white persons" as being peculiarly applicable to Europeans and descendants of Europeans, nevertheless this naturalization act had been amended by Congress at various times over a period from 1790 to 1875, and that without question during that period of time it was well understood in this country that the expression "white persons" was applicable to others than Europeans, and among others, to Syrians.

F. ARMENIANS HELD TO BE "WHITE PERSONS"
AND ENTITLED TO NATURALIZATION.

In re Halladjian et al., 174 Fed. 834.

In this case it was held by the United States Circuit Court, District of Massachusetts, that certain Armenians, all born in Asiatic Turkey, were free white persons entitled to be naturalized in the United States. The court held against the theory that "white persons" was to be construed as synonymous with "European," there being in fact no "European" or "white" race as a distinctive class, or "Asiatic" or "yellow" race, including substantially all the people of Asia; and that therefore the term "free

white persons" included Armenians born in Asiatic Turkey and on the west side of the Bosphorus. The real point of this decision is that the history of Asiatic Turkey shows that these Armenians were of the white or Caucasian race. At page 840 the court says:

"If, however, * * * we are compelled by statute to classify for the purposes of American naturalization every man living on the earth as a member of some one race, we shall find that the Armenians have always been classified in the white or Caucasian race, and not in the yellow or Mongolian."

Scientific authorities are referred to by the court in *In re Halladjian*, 174 Fed. 834, at 840. For the proposition that Armenians are to be classed as white or Caucasian, rather than as Mongolian or yellow, the court says:

"This court can not be expected in any reasonable time to get a thorough education in ethnology, especially in modern ethnological theories. Its information is got at second or third hand; but a casual examination of books on ethnology, standing together on the shelves of a large library, old and new, weighty and unimportant, shows complete agreement in the proposition that Armenians are to be classed as white or Caucasian, rather than as Mongolian or yellow. Figuiet, Brace, Keane, Pickering, Brinton, Hutchinson, Jeffries, Pritchett, and Retzel, authors taken quite at random, all reach the same conclusion. This is true of Blumenbach, an influential author

of the eighteenth century, and of Quatrefages and Huxley about a century later. Cuvier expressly included Armenians, as well as Hindoos, in the Caucasian race, as distinguished from the Mongolian. With this agree modern travelers, such as Bryce and W. H. Ward. Some modern ethnologists, indeed, reject altogether the "Caucasian or white" classification; but their theories do not help the United States. Ripley, for example, asserts that there is no 'European or white race,' and that there are three great races to be found in Europe, one of which may have come from Africa across the Mediterranean. Topinard, as quoted by Ripley, has said:

'Race in the present state of things is an abstract conception, a notion of continuity in discontinuity, of unity in diversity. It is the rehabilitation of a real but directly unattainable thing.' "

G. HINDUS HELD TO BE "WHITE PERSONS" AND ENTITLED TO NATURALIZATION.

In re Mohan Singh, 257 Fed. 209.

In this case the United States District Court, Southern District of California, held that a certain Hindu from India was a member of the Aryan branch of the Caucasian race and therefore entitled to be naturalized. The court, at page 212, cites with approval the language from the *Balsara* case, to the effect that Japanese do not belong to the white race.

United States vs. Balsara, 180 Fed. 694.

In this case the United States Circuit Court of Appeals, Second Circuit, held that a Parsee from

India is a member of the white or Caucasian race and therefore entitled to admission to citizenship.

In re Bhagat Singh Thind, 268 Federal, 683.

In this case, decided October 18, 1920, the United States District Court in Oregon held that the high-class Hindu, coming from Punjab in the northwest part of India, is ethnologically a white person so as to entitle him to the rights of naturalization in the United States. The decision is based upon former decisions; that is *In re Mohan Singh* (D. C.) 257 Fed. 209, *In re Halladjian* (C. C.) 174 Fed. 834, and *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.

II.

STATUTORY HISTORY OF UNITED STATES NATURALIZATION STATUTES, AND COURT REFERENCES THERETO, SHOW THAT EXPRESSION "WHITE PERSONS" WAS USED TO EXCLUDE THE MONGOLIAN-MALAY TYPE.

At page 22 of brief for petitioners, in the *Yamashita* case, it is stated that

"Congress in repeating without qualification the words 'white persons' has left the subject in great uncertainty * * *. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the act of 1870, and after that date, as having no practical significance."

We respectfully submit that the above statement from the brief for petitioners ignores the history of

the amendments to the original naturalization act which history has been commented on by various United States courts and by members of Congress in their debates.

It also ignores the history of the times paralleling and coincident with these different amendments, throughout which amendments the expression "white persons" was always retained and of course must have been used in view of the commonly accepted understanding that the Japanese belonged to the so-called yellow-brown or Mongolian-Malay race. If this yellow or brown race was not recognized as such in distinction to the white race and as being a part of the population of America when the first naturalization act was adopted in 1790, it certainly was throughout the later years when Congress adopted naturalization legislation without any change in the expression "white persons." As late as June 29, 1906, Congress adopted "an act to establish a bureau of immigration and naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States." This act, a comprehensive revision of the naturalization code, left section 2169 of the Revised Statutes intact. Section 26 of the 1906 act expressly repealed sections 2165, 2167, 2168 and 2173 of the Revised Statutes, but did not repeal section 2169. It is of course clear that in the year 1906 the Japanese were recognized by the American people as not being of the white race. The entire problem of the Chinese and Japanese and other

India is a member of the white or Caucasian race and therefore entitled to admission to citizenship.

In re Bhagat Singh Thind, 268 Federal, 683.

In this case, decided October 18, 1920, the United States District Court in Oregon held that the high-class Hindu, coming from Punjab in the northwest part of India, is ethnologically a white person so as to entitle him to the rights of naturalization in the United States. The decision is based upon former decisions; that is *In re Mohan Singh* (D. C.) 257 Fed. 209, *In re Halladjian* (C. C.) 174 Fed. 834, and *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.

II.

STATUTORY HISTORY OF UNITED STATES NATURALIZATION STATUTES, AND COURT REFERENCES THERETO, SHOW THAT EXPRESSION "WHITE PERSONS" WAS USED TO EXCLUDE THE MONGOLIAN-MALAY TYPE.

At page 22 of brief for petitioners, in the *Yamashita* case, it is stated that

"Congress in repeating without qualification the words 'white persons' has left the subject in great uncertainty * * *. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the act of 1870, and after that date, as having no practical significance."

We respectfully submit that the above statement from the brief for petitioners ignores the history of

the amendments to the original naturalization act which history has been commented on by various United States courts and by members of Congress in their debates.

It also ignores the history of the times paralleling and coincident with these different amendments, throughout which amendments the expression "white persons" was always retained and of course must have been used in view of the commonly accepted understanding that the Japanese belonged to the so-called yellow-brown or Mongolian-Malay race. If this yellow or brown race was not recognized as such in distinction to the white race and as being a part of the population of America when the first naturalization act was adopted in 1790, it certainly was throughout the later years when Congress adopted naturalization legislation without any change in the expression "white persons." As late as June 29, 1906, Congress adopted "an act to establish a bureau of immigration and naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States." This act, a comprehensive revision of the naturalization code, left section 2169 of the Revised Statutes intact. Section 26 of the 1906 act expressly repealed sections 2165, 2167, 2168 and 2173 of the Revised Statutes, but did not repeal section 2169. It is of course clear that in the year 1906 the Japanese were recognized by the American people as not being of the white race. The entire problem of the Chinese and Japanese and other

Mongolian and Malay peoples had, years prior to 1906, been very clearly presented to and understood by Congress.

As said by Judge Clemons in the *Ozawa* case at page 685 of Volume 4, United States District Court for Hawaii:

“As lately as 1906 Congress went over the whole law of naturalization, and yet in the face of the well-known rulings of the published decisions which had interpreted the particular section here in question, the section was left just as it was. This is a very persuasive reason for the conclusion that Congress acquiesced in, and adopted, the interpretation which the courts had put upon its own work. 226 Fed. 145, 148.”

The first naturalization act was the act of March 26, 1790 (1 U. S. Stat. at L., page 103). Section 1 provided that “any alien being a free white person,
* * * may be admitted to become a citizen of the United States.”

This was repealed five years later by the act of January 29, 1795 (1 U. S. Stat. at L., page 414). Section 1 of this repealing act repeated and continued the identical above quoted language found in the act of 1790.

The act of 1795 was in turn repealed about seven years later by the act of April 14, 1802 (2 U. S. Stat. at L., page 153).

The 1802 act, in section 1 thereof, again repeated and continued the identical language.

Two years later a supplemental act of March 26, 1804, again repeated this identical language (2 U. S. Stat. at L., page 292).

Twenty years thereafter a supplemental act of May 26, 1824, in section 1 thereof, again repeated the identical language (4 U. S. Stat. at L., page 69).

Four years later an act adopted May 24, 1828, amended section 2 of the act of April 14, 1802, and included the identical language (4 U. S. Stat. at L., page 310).

In the year 1870, after the Civil War and in view of the peculiar position of inhabitants of African descent in this country, Congress amended the law so as to permit the naturalization of Africans and aliens of African descent (Act of July 14, 1870, 16 U. S. Stat. at L., 254). In 1873 the Revised Statutes were codified and this permission to Africans and aliens of African descent was included in section 2169 of the Revised Statutes. Through an oversight of the codifiers, however, the language "free white persons" was omitted. This omission was corrected in 1875 by the act to correct errors and supply omissions in the Revised Statutes. (This is the act of February 18, 1875, 18 Stat. at L., 316). The statute reads:

"That for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, Anno Domini eighteen hundred and seven-three,' so as to make the same truly express such laws, the following amendments are hereby made

therein: * * *. Section two thousand one hundred and sixty-nine is amended by inserting in the first line, after the word 'aliens' the words 'being free white persons, and to aliens.' "

This amendment refers to the Revised Statutes of 1873, section 2169, page 382. After the amendment the said section 2169 read as follows: (the amendment being noted in brackets):

"The provisions of this title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent."

The title so referred to is title 30 of the Revised Statutes, entitled "Naturalization."

The United States Circuit Court in *In re Saito*, 62 Fed. 126, at page 127, refers to the act of February 18, 1875, to correct errors and supply omissions in the first revision made in 1873 of the United States Statutes. It was in this act of 1875 that the codification of section 2169 of the Revised Statutes was amended by restoring the words "free white persons." The court states that in moving to adopt this amendment in the House it was stated that this omission of the revision of 1873 operated to extend naturalization to all classes of aliens and especially to the Asiatics; and that a few years theretofore the proposition of Mr. Sumner in the Senate to strike out the word "white" had been defeated and that the committee only proposed, by restoring these words, to place the law where it stood at the time of

the revision in 1873. Reference is made by the court to the fact that the debate that followed proceeded on the assumption that by restoring the word "white" the Asiatics would be excluded from naturalization, and further that the amendment was adopted with this understanding of its effect.

The court refers to Vol. 3, Part II, Congressional Record, 43d Congress, Second Session, January 28 to February 23, 1875, page 1081.

It will be of value to quote from this Congressional Record. Mr. Poland on behalf of the committee on revision of the laws was addressing himself to the amendment to restore this language to section 2169 and spoke to the question as follows:

"There is one other matter immediately following this on the same page. I will read the paragraph:

Section 2169 is amended by inserting in the first line, after the word 'alien,' the words 'being free white persons, and to aliens.'

The original naturalization laws only extended to free 'white' persons. That was the condition of the naturalization laws for a great many years. A very few years since, upon some bill, Mr. Sumner of Massachusetts, then in the Senate, moved to strike out the word 'white' from the naturalization laws, and it was objected to upon the ground that that would authorize the naturalization of this class of Asiatic immigrants that are so plentiful upon the Pacific coast. After considerable debate, instead of striking out the word 'white,' it was provided that the naturalization

laws should extend to Africans and persons of African descent. Precisely what the view of the gentleman was who revised the naturalization laws, I am unable to determine. He has left out the word 'white' but has kept in the provision in relation to Africans and persons of African descent. The leaving out of the word 'white' would seem to leave the naturalization to extend to every species of alien, but that evidently was not the idea of the gentleman who revised that chapter, because he kept in the provision in relation to Africans or persons of African descent. We have proposed by this amendment to restore the law to just the condition in which it was before the revision was made.

The member of our committee who had this chapter on the naturalization laws to examine as a subcommittee failed to notice this change in the law or it would have been brought before the House when the revision was adopted."

Mr. Willard, of Vermont, then addressed himself to the question as follows:

"I understand that the Committee on the Revision of the Laws do not make this recommendation upon the merits of the question at all, but simply upon the general principle upon which they are proceeding, to restore this revision as nearly as possible to the condition in which the law was at the time the revision was passed. It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word 'white' stricken out, is

not a wise statute. I understand that members from California and the Pacific coast make objection to the naturalization of Asiatics, more especially the Chinese. That question has been before Congress at different times. As has been suggested by my colleague (Mr. Poland) it was squarely presented in the Senate by the proposition of Mr. Sumner to strike out the word 'white' from the naturalization laws.

I can not see why there should be this invidious distinction made against any class of foreigners. We invite immigrants to this country from all countries; we open our ports wide to every immigrant who comes to our shores. And if this word 'white' shall be restored we will keep upon our statute a provision by which only a portion of those who come to this country can be naturalized, and certainly, as far as we know not by any means necessarily the least intelligent portion of the emigrants who come here. I merely call the attention of the House to this matter for the purpose of suggesting that if they are ready to say that this word 'white' should be retained in the naturalization laws on principle, or on the merits of the question, of course it is proper for them to say so. But I think it is a good time now, inasmuch as we have it out of the law, to let it remain out. And as my colleague has yielded to me for the purpose of allowing an amendment to be moved to this bill, I will move to amend it by striking out the paragraph relating to this subject, which will leave the naturalization law to stand as the revisers left it, with the word 'white'

not in it at all. The paragraph I move to strike out is as follows:

Section 2169 is amended by inserting in the first line, after the word 'alien,' the words 'being free white persons, and to aliens.' "

This motion was defeated and the amendment as proposed by the committee was adopted.

The opinion is of value from the standpoint, first, of discussion of the racial characteristics of the Japanese and Chinese; second, of the intention of Congress to include the Chinese and Japanese as excluded from the privilege of naturalization, as is shown by the history of the naturalization acts and the debates in Congress and, third, a discussion of the adjudicated cases.

After quoting the provisions of section 2169 of the Revised Statutes, to the effect that the provisions of the title on naturalization shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent, the court says:

"The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term 'white persons.'

These words were incorporated in the naturalization laws as early as 1802. (2 Stat. 154.) At that time the country was inhabited by three races, the Caucasian or white race, the Negro or black race, and the American or red race. It is reasonable, therefore, to infer that when congress, in designating the class of persons who

could be naturalized, inserted the qualifying word 'white,' it intended to exclude from the privilege of citizenship all alien races except the Caucasian.

But we are not without more direct evidence of legislative intent. In 1870, after the adoption of the thirteenth amendment to the constitution, prohibiting slavery, and the fourteenth amendment, declaring who shall be citizens, the question of extending the privileges of citizenship to all races of aliens came before congress for consideration. At that time, Charles Sumner proposed to strike out the word 'white' from the statute; and in the long debate which followed the argument on the part of the opposition was that this change would permit the Chinese (and therefore the Japanese) to become naturalized citizens, and the reply of those who favored the change was that this was the very purpose of the proposed amendment. (Cong. Globe, 1869-70, pt. 6, p. 5121.) The amendment was finally rejected, and the present provision substituted, extending the naturalization laws to the African race.

Again in the first revision of the statutes, in 1873, the words 'being free white persons' were omitted, probably through inadvertence. Under the act of February 18, 1875, to correct errors and supply omissions in the first revision, this section of the statute was amended by inserting or restoring these words. In moving to adopt this amendment in the house, it was stated that this omission operated to extend naturalization to all classes of aliens, and especially to the Asiatics; and reference was made to the fact that a few years before, the proposition of Mr. Sumner, in the senate, to

strike out the word 'white,' had been defeated, and that the committee only proposed, by restoring these words, to place the law where it stood at the time of the revision. The debate which followed proceeded on the assumption that by restoring the word 'white' the Asiatics would be excluded from naturalization, and the amendment was adopted with this understanding of its effect. (3 Cong. Rec., pt. 2, p. 1081.)

The history of legislation on this subject shows that congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

The words of a statute are to be taken in their ordinary sense unless it can be shown that they are used in a technical sense.

From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races.

And this is true from a scientific point of view. Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race,

and it lies at the foundation of the classification which scientists have adopted. (Blumenbach, in 1781, divided mankind into five principal types, the Caucasian or white, Mongolian or yellow, Ethiopian or black, American or red, and Malay or brown.) Cuvier simplified this classification into Caucasian, Mongol, and Negro, or white, yellow, and black races. Other writers make a still larger number of distinct races. It is said that Prof. Huxley's division of mankind is the most satisfactory. He distinguishes four principal types, and he points out the marked physical characteristics of each. These types are the Australioid (chocolate brown), Negroid (brown black), Mongoloid (yellow), and Xanthochroic (fair whites). To these he adds a fifth variety, the Melanochoic (dark whites). The 'fair whites' are the type of the prevalent inhabitants of northern Europe; and the 'dark whites,' of southern Europe. All these physical differences do not exist in the case of each individual, and 'innumerable varieties of mankind run into one another by insensible degrees;' but, taking the race or type as a whole, their peculiarities are sufficiently distinct to form the basis of well-recognized classification. *Enc. Brit.* tit. 'Anthropology.'

Before the act of May 6, 1882 (22 Stat. 58, 61), which prohibited the naturalization of Chinese, or when the Chinese and Japanese stood on the same footing under the law the question of the right to naturalize a Chinaman came before Judge Sawyer in the case *In re Ah Yee*, 5 Sawy. 155, Fed. Cas. No. 104, and, in a well-considered

opinion, the court denied the application. See, also, *In re Camille*, 6 Sawy. 541 6 Fed. 256; *Elk vs. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41; *Fong Yue Ting vs. U. S.*, 149 U. S. 698, 716, 13 Sup. Ct. 1016.

Whether this question is viewed in the light of congressional intent or of the popular or scientific meaning of 'white persons,' or of the authority of adjudicated cases, the only conclusion I am able to reach, after careful consideration, is that the present application must be denied.

Application denied."

The act of May 6, 1882 (22 Stat. 58, 61), prohibiting the naturalization of Chinese, was an unnecessary act, inasmuch as the courts had theretofore determined that Chinese were not entitled to naturalization in this country.

See *In re Ah Yup*, Federal Cases No. 104, decided by the U. S. Circuit Court, District of California, in 1878.

On June 29, 1906, there was adopted a new naturalization statute providing a complete procedure for naturalization. As we above pointed out, this act repealed sections 2165, 2167, 2168 and 2173 of the Revised Statutes but left intact section 2169, which limits naturalization rights to white persons and those of African nativity or descent. (See 6 Fed. Stat. Ann., page 1001.)

As late as 1918, during the recent war, congress passed an act granting to any alien who had served in the military or naval forces of the United States special privileges in the matter of naturalization.

In the case of *In re En Sk Song*, 271 Fed. 23, United States District Judge Bledsoe, Southern District of California, held that this act of congress of May 9, 1918 (40 Statutes, 542), eliminating certain requirements for the naturalization of aliens who had served in the United States Army or Navy during the recent war, did not in any way affect the provisions of section 2169 which limited the right to naturalization to free white persons. That is, it was held that reliance could not be had on that provision of said 1918 amendment which stated that "any alien serving in the military or naval service of the United States," etc., may file a petition for naturalization, without making the preliminary declaration of intention, and without proof of the required five years' residence within the United States. The court decided that "any alien" must be read in connection with the theretofore existing provision of section 2169.

The above act of May 9, 1918, takes the place of section 2166 of the Revised Statutes, which is found in Volume 6, Federal Stat. Ann., 2d Ed., page 941, and which was the act of July 17, 1862.

In the year 1908 the United States District Court for the Western District of Washington, considered said section 2166 and recognized this expression "white persons" as excluding Japanese. This was the case of *In re Buntaro Kumagai*, 163 Fed., page 922, where the court decided that a Japanese was not

entitled to claim the privileges of the act of July 17, 1862 (12 Stat. at L., 597), which statute recognized the services of aliens who enlisted in the military service of the United States and authorized naturalization of such aliens when honorably discharged from such service. The court decided that the Statute of 1862 must be read in connection with the statute which had been on the books ever since 1790 and limiting the privilege of naturalization to "white persons."

Counsel for petitioners are therefore in error when at page 3 of their brief in the *Yamashita* case they state that this act of 1862 constituted an exception to the general rule limiting naturalization privileges to white persons. The same mistake is made in referring to the Statute of June 7, 1872 (17 Stat. at L., 262, 268), granting certain privileges of naturalization to seamen on United States merchant ships.

In the case of *United States vs. Balsara*, 180 Fed. 694, at pages 696 and 697, the United States Circuit Court of Appeals, Second Circuit, enunciates the rule that the act of June 29, 1906, revising the naturalization law does not by implication repeal section 2169 of the Revised Statutes.

In re Geronimo Para, 269 Fed. 643, was decided by the United States District Court in New York on May 3, 1919. In this case it was held that the act of June 29, 1906, as amended by act of May 9, 1918 (Compiled Statutes 1918, Compiled Statutes Annotated Supp. 1919, Sec. 4352), relative to the natu-

ralization of "any alien," Porto Rican, or Filipino serving in the army or navy merely provides for more expeditious and favorable terms of admission for such persons than existed before and does not extend the right of naturalization to aliens other than free white persons, aliens of African nativity and persons of African descent. It was therefore held that a Japanese was not entitled to naturalization; also that a South American Indian was not entitled to naturalization. At page 643 the court said:

"The government contends that naturalization is under any circumstances restricted to free white persons, persons of African descent, and native-born Filipinos and Porto Ricans. Heretofore persons eligible for naturalization have not included Indians, Malays, or Mongolians." (Citing cases.)

A reading of the naturalization act of June 29, 1906 (34 Stat. at L. 596) clearly shows that there was no intention in said act to in any way affect the long existing rule limiting the rights of citizenship to white persons and those of the African race and African descent. The statute was adopted in recognition of that rule and has been uniformly construed by the courts as in no way intending to change the rule that has existed for over a century and a quarter with reference to white persons, and since 1870 with reference to Negroes.

Section 1 of the act changes the designation of the Bureau of Immigration and the Department of La-

bor to the "Bureau of Immigration and Naturalization" and states that this bureau shall have charge of all matters pertaining to the naturalization of aliens.

Section 2 is a temporary section providing for offices, etc.

Section 3 determines the courts that shall have jurisdiction over naturalization.

Section 4 enumerates the manner in which an alien may become a citizen of the United States. That is, it determines with reference to declaration of intention, petition for citizenship certificates, certificates of arrival and intention, declarations, evidence of residence, etc. Subdivision second of section 4 expressly recognizes a certain class of persons "authorized and qualified under existing law to become a citizen of the United States," who because of misinformation in regard to citizenship or the requirements of the law have labored under the impression that they could become citizens of the United States and in good faith exercised the rights or duties of a citizen because of such wrongful information or belief. Here and throughout the act we find an express recognition of existing law, which law is referred to as determining qualifications for citizenship.

Section 5 provides for a public notice of the petition.

Section 6 provides for filing and docketing of petitions and for the hearings.

Section 7 prohibits naturalization to anarchists or polygamists irrespective of their race.

Section 8 requires that the applicant must be able to speak the English language.

Section 9 provides for final hearings being held in open court.

Section 10 refers to evidence of residence.

Section 11 provides for opposition by the United States government to applications for citizenship.

Section 12 provides for the duties of the clerk of the court.

Section 13 provides for the fees that must be paid.

Section 14 provides for the binding of papers.

Section 15 refers to the proceedings to cancel certificates illegally secured.

Sections 20, 21, 22, 23, 24 and 25 provide for punishment for violations of the act.

Section 26 is the express repealing section of the act, and while it repeals sections 2165, 2167, 2168 and 2173 of the Revised Statutes, it does not repeal section 2169 of the Revised Statutes. This in itself is conclusive on this point of section 2169 being still in full force and effect.

Section 27 provides for forms of petitions, declarations, etc.

Section 28 authorizes the Secretary of Commerce and Labor to make rules and regulations.

Section 30 provides for naturalization of persons owing allegiance to the United States but not United States citizens.

The above analysis of the 1906 act would seem to establish that the courts and government officials have undoubtedly expressed the correct rule when they have so often decided that section 2169 of the Revised Statutes is in no way in conflict with but rather is supplemental to the 1906 statute.

We know of no authority to the contrary and we met with this suggestion for the first time in the brief for petitioner in the *Ozawa* case now pending in this court.

The act of June 29, 1906, provides for "a uniform rule for the naturalization of aliens throughout the United States." It describes the "manner" in which an alien may become a citizen of the United States. It does not, however, purport to include all of the statutory provisions of the United States on the subject of naturalization. It did not repeal any of the laws relating to the naturalization of aliens, except those set forth in section 26 of the act, including any acts inconsistent with the said act of 1906.

Section 2169 of the Revised Statutes describes the races which Congress determined might be naturalized. The act of June 29, 1906, describes the manner and the procedure and conditions under which those races so described in section 2169 might be naturalized. If Congress had intended to make the 1906 act complete in itself, it would have repealed title XXX of the Revised Statutes and reenacted those sections thereof to be kept alive by including them in the act of 1906.

Counsel for petitioner in the *Ozawa* case, at pages 15 and following, urge that the history of section 2169 of the Revised Statutes shows that it was never intended to be a restrictive statute limiting the rights of citizenship to those of the Caucasian and African races, but rather that it was an enlarging statute to extend the right to those of African nativity and of African descent. It is further argued that the language in the section that "*the provisions of this title shall apply to aliens, being free white persons and to aliens of African nativity and to persons of African descent,*" indicates that any limitation to such white persons and aliens of African nativity and persons of African descent must be considered only with reference to "*the provisions of this title,*" that is title XXX of the Revised Statutes.

It is pointed out that the naturalization act of June 29, 1906, appears to be all comprehensive and complete and is not a part of said title XXX. From this it is concluded that any restriction of the right of naturalization to whites and such Africans as above described must be a restriction only concerning those other sections of said title XXX which grant rights of naturalization. It is urged that we must look to these other unrepealed sections in title XXX as, for instance, section 2166, applying to aliens honorably discharged from the military service and section 2174 applying to naturalization of certain seamen. These last sections were unrepealed

at the time of the 1906 act. They have, however, since been repealed by the act of May 9, 1918 (Fed. Stat. Ann. Supp. 1918, p. 488), which takes the place of sections 2166 and 2174.

This ingenious argument would set aside the construction by the courts over a period of many years and recognition by Congress in repeated legislative sessions of this judicial construction as expressing the real intent of Congress.

From 1790 to 1870, a period of eighty years, we had, not as a part of any title XXX, the substantive naturalization law limiting the rights of naturalization to free white persons. In 1870 was enacted the statute of July 14, 1870 (16 Stat. at L. 256), which extended this right to those of African nativity and African descent. This statute again was not a part of any title of Revised Statutes, the revision not coming until the year 1874, being approved June 22, 1874 (Revised Stats. of the United States, 1873-1874, p. 1092, for approval thereof).

Then for the first time in 1874 we have the Revised Statutes. Through an oversight the restriction limiting the rights of naturalization to free white persons and to those of African nativity or descent, was omitted from the Revised Statutes. This was cured by the amendment of 1875 as soon as Congress discovered the error of the codifiers, by incorporating the language which existed throughout these years from 1790 to 1870, so far as whites are concerned, and from 1870 to 1875, so far as Africans are concerned,

in section 2169 of the Revised Statutes. From the year 1875 down to the naturalization act of 1906 we have these controlling provisions included within the Revised Statutes. Not only the substantive naturalization act stating the conditions under which aliens might become naturalized, but the limitations thereon to free whites and those of African nativity or descent were found from 1875 down to 1906 in the Revised Statutes.

During this period of about thirty-one years Congress and the courts treated these sections of the Revised Statutes exactly as they had for the eighty-year period from 1790 to 1870 treated the substantive naturalization acts of Congress. The only difference was that this substantive naturalization law was codified into sections of the Revised Statutes. Then in 1906 Congress adopted the present naturalization act. For the sixteen years subsequent thereto the courts have consistently ruled that section 2169 of the Revised Statutes, which was not repealed by the 1906 act, has remained in full force and effect, not only with reference to other sections of the Revised Statutes but also with direct reference to the 1906 act. Over and again have the courts declared that rights claimed under the 1906 act must be controlled and limited by section 2169 of the Revised Statutes. Congress has met every two years during this sixteen-year period, and knowing of these court decisions has certainly considered them as a proper expression of

the legislative intent not to modify the naturalization law so as to remove the limitations of section 2169.

Indeed today the only section left of these pertinent section of the Revised Statutes in section 2169. The 1906 act repealed sections 2165, 2167, 2168 and 2173 of the Revised Statutes. The act of May 9, 1918, repealed sections 2166 and 2174 of the Revised Statutes. That leaves then sections 2169, 2170, 2171 and 2172. Section 2170 is the five-year residence requirement. Section 2171 refers to alien enemies not being admitted. Section 2172 refers to children of persons naturalized under certain laws. There is nothing in these sections for section 2169 to operate upon. How ridiculous then it would be to consider that Congress has specifically throughout all these years retained section 2169 for no purpose whatever. The only purpose, of course, of specifically retaining section 2169 and refusing to repeal it along with other repealed sections was that the rule might remain as it has always been and as construed by the courts, with Congress so understanding this judicial construction. This rule is and always has been that no alien is entitled to naturalization unless he is included within such races of people as Congress has affirmatively stated are entitled to the rights of naturalization.

To say that the act of 1870 extending the right of citizenship to those of African nativity and of African descent, together with the other provisions

describing free white persons as entitled to this right and as now finally incorporated in section 2169, is an enlarging and not a restrictive statute, is to lose sight of the fundamental principle of naturalization as understood by the framers of the United States constitution. The constitution authorized Congress "to establish an uniform rule of naturalization" (article I, section 8).

It requires affirmative action by Congress to describe those certain persons who might be naturalized, before the right to naturalization accrues. Congress having so expressed itself with reference to a certain class of persons who may be naturalized, by such expression excludes all those who do not come within that classification.

If Congress has passed no statute at all no one would be entitled to naturalization. An applicant for naturalization coming before a court of the United States must clearly show himself to come within a class described by act of Congress before he is entitled to naturalization.

The United States Supreme Court gave expression to this view in *United States vs. Wong Kim Ark*, 169 U. S. 649. At pages 701-2-3 the court said:

"It is true that Chinese persons born in China can not be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear

by tracing the history of the statutes, treaties and decisions upon that subject * * *.

A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts."

Senator Edmunds, at the time of the debate on section 14 of the act of May 6, 1882, (22 Stats. at L., 58-61) said "The constitution provides that Congress may make uniform rules of naturalization so that no person can be admitted to citizenship without affirmative action by Congress. * * * He can not become a citizen until Congress shall affirmatively provide that he may; * * *." (Vol. XIII, Part IV, pages 3411-3412 Congressional Record, 47th Congress, First Session.)

The argument of counsel limiting the prohibition of section 2169 to title XXX of the Revised Statutes is highly technical and if sustained would defeat the clear purposes of Congress as those purposes have been judicially declared by many courts.

Another argument which we respectfully urge would lead to absurd results is, that unless the act

of 1870 extending to those of African nativity or descent and section 2169 are considered as enlarging rather than restrictive legislation, there must have been a period from 1874 to 1875, and until the corrective legislation of 1875, when the only persons entitled to naturalization were those of African nativity or descent. Counsel say at page 16 of their brief in the *Ozawa* case that such a condition would be "incredible."

The "incredible" condition referred to never existed. Until 1870 the law was that all free whites might be naturalized. In 1870 this privilege was extended to those of African nativity or descent. For the period, then, from 1870 to 1874, free whites and those of African nativity or descent might be naturalized. In 1874, at the time of the approval of the Revised Statutes, and by a mistake of the codifiers thereof, the privilege of naturalization was extended to all aliens. Section 2165 of the Revised Statutes provided that "an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise: * * *."

At the same time the act of 1870 extending the privilege to those of African nativity or descent was still on the statute books. The language thereof, however, with the law in the condition that it was from 1874 to 1875, was meaningless, for from 1874 to 1875 the privilege was extended to the whole world without any limitations as to race. It was provided that "any alien" might be naturalized. The privilege

was not for this year, as claimed by counsel, limited to those of African nativity or descent. It was extended to the world. It was because of this condition which came through an error of the codifiers that the courts admitted certain Chinese to naturalization. Then in 1875, in order to correct this condition, Congress amended section 2169 by restoring to our naturalization law the language limiting naturalization to free whites along with those of African nativity or descent, who were in this amendment included in the same section of the Revised Statutes that dealt with the free whites. Congress, therefore, in 1875 restored the law to the exact condition in which it was prior to the approval of the Revised Statutes in 1874. Prior to this approval of 1874 we had the old act of April 4, 1802, to the effect that "any alien, being a free white person, may be admitted to become a citizen." We also had, from 1870 to 1874, the act granting the same privilege to those of African nativity or descent. In 1874 by error the right was extended to all aliens. In 1875 by amendment to section 2169 the law was restored to the condition as it was prior to the approval of the revision in 1874.

U. S. District Judge Rudkin of the District Court of the State of Washington, in *In re Ahkay Kumar Mozumdar*, 207 Fed. 115, gave a succinct expression of the rule that "white persons" must be construed in view of the period of time and changing conditions embraced in the different amendments to section 2169.

At page 117 he says:

“But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only. *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Saito* (C. C.), 62 Fed. 126; *In re Camille* (C. C.), 6 Fed. 256; *Mater of San C. Po*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; *In re Buntaro Kumagai* (D. C.), 163 Fed. 922; *In re Knight* (D. C.), 171 Fed. 297; *In re Najour* (C. C.), 174 Fed. 735; *In re Halladjian* (C. C.), 174 Fed. 834; *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.”

In re Ellis, 179 Fed. 1002.

In this case the U. S. District Court for the District of Oregon held that a Syrian was of the white race and entitled to be naturalized.

Referring to the use of the word “white” in section 2169 of the Revised Statutes as shown by the many amendments to the section always retaining the word “white” and the Congressional debates on said amendments, the court at page 1003 says:

“* * * there is reason for the view, based upon more recent legislation and the debates in Congress pertaining thereto, that the word ‘white’ was employed to distinguish between the white, the African, and the Mongolian races. *In re Saito* (C. C.), 62 Fed. 126; *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104. While it may be true that a statute should be interpreted in the light of the

conditions prevalent under which it was enacted, yet the words 'free white persons' are devoid of ambiguity, and are of plain and simple signification."

At page 9 of the brief for petitioner in the *Ozawa* case, counsel cite the case of *U. S. vs. Rodiek*, 162 Fed. 469, to the point that the act of June 29, 1906, repealed an inconsistent section of a naturalization statute in an act of April 30, 1900, the latter being the organic act of the Territory of Hawaii.

Examination of this case shows that the inconsistent provision of the Hawaiian act authorized the naturalization of persons who had resided in Hawaii for five years prior to the said act taking effect, without a previous declaration of intention. It was of course properly held that the later act requiring a declaration of intention in all cases except of persons who have served in the army or navy repealed the earlier provisions. Also at page 9 of the brief the language of the court from the case of *Bessho vs. United States*, 178 Fed. 245, is cited, to the point that the 1906 act provided a new and complete system of naturalization. A reading of the decision in the *Bessho* case shows that the court ruled contra to the theory of counsel in this case. It was held that the 1906 act, since it did not expressly repeal section 2169 of the Revised Statutes, left that section intact so as to limit and control the act of July 26, 1894 (28 Stats. at Large, 124), authorizing the naturalization of "any alien" twenty-one years or more of age who

had served in the United States navy or marine corps, as therein provided. An alien of the Japanese race was held not entitled to naturalization under said act of 1894, because of the provisions of section 2169.

At pages 9 to 11 of the brief counsel cite similar language to the effect that the 1906 act provides a complete system of naturalization, from the following cases:

In re Leichtag, 211 Fed. 681;

In re Mallari, 239 Fed. 416;

Hampden County vs. Morris, 207 Mass. 167; 93 N. E. 579;

U. S. vs. Ginsberg, 243 U. S. 472;

U. S. vs. Ness, 245 U. S. 319, and

U. S. vs. Peterson, 182 Fed. 289, 291.

We shall now take these cases up in order.

In re Leichtag, 211 Fed. 681.

This case decides that section 2166 of the Revised Statutes, not having been repealed by the act of 1906, is still in force and effect. This supports our theory with reference to section 2169.

In re Mallari, 239 Fed. 416.

In this decision the court held that section 30 of the act of 1906 was adopted for the benefit of citizens of the Philippines and Porto Rico, and that therefore inasmuch as they are not aliens, section 2169 of the Revised Statutes, referring specifically to aliens, does not apply to them. It is further held that the act of July 26, 1894 (28 Statutes, 123), admitting to

citizenship aliens honorably discharged from the service of the navy, without requiring the declaration of intention, does not apply to these citizens of the Philippines, because they are not aliens. They, therefore, come under the said section 30 of the 1906 act, the requirement of which as to declaration of intention and residence must be complied with.

Hampden County vs. Morris, 93 N. E. 579.

This case held that the fixing of fees in the act of congress of 1906 would control over a state statute fixing different fees. Of course this must be the rule in order to permit of carrying out the constitutional authorization to congress to fix a uniform rule of naturalization.

U. S. vs. Ginsberg, 243 U. S. 472.

This case is of no importance so far as the act of 1906 repealing section 2169 of the Revised Statutes is concerned. It simply holds that final hearings upon petitions for naturalization shall be held entirely in open court. It is, however, of interest to note the following language of the United States Supreme Court in this case at page 474:

“An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modification; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.”

This requirement of affirmative action by Congress to determine who may be naturalized is contra to counsel's theory, which is that section 2169, Revised Statutes, must not be read as prohibiting citizenship to those not free white persons or of African nationality or African descent.

U. S. vs. Ness, 245 U. S. 319.

This case is of no importance so far as the point under discussion is concerned. The court held that the filing of a certificate of arrival, as provided in section 4, subdivision 2 of the 1906 act, is an essential prerequisite to a valid order of naturalization, and that a certificate of naturalization obtained without the filing of such a certificate of arrival could be set aside in a suit by the United States.

U. S. vs. Peterson, 182 Fed. 289, 291.

This decision held that the requirement of the act of 1906 that notice of the petition for citizenship must be posted for ninety days prior to the hearing is applicable in the case of an alien applying under the act of July 26, 1894 (28 Statutes, 124), which provides that service in the navy or marine corps for a specified term and an honorable discharge shall be counted as residence. There is nothing in this case determinative of the point here being discussed. The court held there would appear to be no repugnance between the provisions of the act of 1894 and those of the act of 1906.

Counsel in their brief in the *Ozawa* case make an admission of the unquestioned unanimity of judicial opinion of the proper construction of the expression "free white persons" as contained in our naturalization statutes. They say "No case has * * * given emphasis in the construction of the section to the words 'free' and 'persons', which are as important to the construction as the word 'white'. Nearly all think the section deals with *races*." (Page 61.)

The organic act providing for a government for the Territory of Hawaii, approved April 30, 1900 (31 Stat. at L., 141), provided in section 4 thereof

"That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

The constitution of the Republic of Hawaii (Sec. 1, article 17) provided that "All persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic, are citizens thereof."

Counsel argue that because some Japanese were thus made citizens of the United States by the annexation of Hawaii, a policy of nondiscrimination against the Japanese is shown. As well may it be argued that a similar policy was shown by the United States with reference to the Chinese. Chinese persons, who were citizens of the Republic of Hawaii,

became, by virtue of section 4 of the organic act, citizens of the United States.

23 Op. Atty. Gen. 509;

23 Op. Atty. Gen. 352;

23 Op. Atty. Gen. 345.

When annexing a new country and bringing its people under the jurisdiction of the United States there are many considerations concerning the interests and rights of its inhabitants which our government must heed. This is an entirely separate and distinct subject matter and in no way to be taken as indicating a departure from the traditional policy of the United States in dealing with persons who in fact are aliens owing allegiance to a foreign sovereign.

The same considerations were involved in the granting of citizenship to Porto Ricans. In addition it must be noted that the Porto Rican act was approved March 2, 1917 (39 Stat. at L., 965). This was just before the declaration of war by the United States against Germany on April 6, 1917. Military necessity led to the desire that the United States have not only the loyal interest of Porto Ricans but also proper control over them from a military standpoint.

Any naturalizations of Japanese by the courts as referred to by counsel for petitioner were beyond the power of the courts and therefore void.

A—THE EXPRESS PROHIBITION BY CONGRESS AGAINST CHINESE NATURALIZATION, HAS BEEN HELD BY THE COURTS TO HAVE BEEN UNNECESSARY.

With reference to section 14 of the act of May 6, 1882 (22 Stats. at L., 58, 61), the congressional debates conclusively show that Congress realized that it was not necessary to express the prohibition of this section against Chinese being naturalized. The section was adopted as an unnecessary result of a very considerable demand for anti-Chinese legislation. It was recognized that the law as then existing did not permit of the naturalizing of Chinese and the section was inserted merely to satisfy the extreme demands of those who desired express language in the statutes of a prohibitory character. (Vol. XIII, Part IV, pages 3264, 3405, 3411 and 3412, Congressional Record, 47th Congress, First Session.)

The law, as stated by Senator Edmunds during this debate, required no prohibition against the Chinese or any other race. As he very clearly expressed it no alien was entitled to naturalization unless he came within the affirmative provisions of the act of Congress granting the right to naturalization. The inclusion of section 14 was an unfortunate and equally unnecessary enactment growing out of the particular agitation which then was making its impression upon Congress, and also resulting from a few erroneous decisions admitting Chinese to citizenship.

As Senator Edmunds said, at pages 3411-12, in speaking to his amendment to amend section 14 by striking out all after the word "that" and inserting "nothing in this act shall be construed to change the existing naturalization laws so as to admit Chinese persons to citizenship."

"Mr. President, as this section now stands in the bill, it is the first time in the history of this nation that Congress has undertaken to make prohibitions against naturalization. The constitution provides that Congress may make uniform rules of naturalization, so that no person can be admitted to citizenship without affirmative action by Congress. I do not wish for one to have Congress enact any statute which shall prohibit by affirmative declaration any person from becoming a citizen. He can not become a citizen until Congress shall affirmatively provide that he may; and as this section now stands, it is absolutely unique, probably not only in the history of this country but of every other, and so I move this change so as to leave the law just as it is now in order to avoid what hereafter will be a very unhappy precedent, I am afraid, for a good many people."

Counsel at pages 19 and following of the brief in the *Ozawa* case, argue that because of express statutory prohibitions against Chinese immigration, and the absence of such legislation as against Japanese immigration, the policy of Congress has not been to prohibit Japanese immigration.

Reference is also made to the language of President Roosevelt in his annual message to Congress at the session opening December 5, 1905, wherein he refers in general terms to the policy of admitting as immigrants any that are fit for citizenship. In a characteristic portion of this address the President said that we can not afford to consider whether an immigrant "is Catholic or Protestant, Jew or Gentile; whether he is Englishman or Irishman, Frenchman or German, Japanese, Italian, Scandinavian, Slav or Magyar." It is perfectly obvious that the President was here referring to immigration and not to naturalization. It is also common knowledge that even as to immigration the celebrated "Gentlemen's Agreement" negotiated with Japan by President Roosevelt, was at least intended to solve the problem of immigration.

The United States government has consistently recognized the Japanese problem, just as it has the Chinese problem. It may be that because of a punctilious regard for a people inclined to be over-sensitive, our Federal officials have gained their purposes with reference to the Japanese in a more indirect way than has been the case in dealing with the Chinese. It may indeed be that the more direct method would have been in the long run the more satisfactory solution. But in any event President Roosevelt, in using the language above quoted, did not intend to suggest that Japanese are entitled to naturalization.

Neither the President nor the Congress could change the rule limiting naturalization rights to those of the white race and of African nativity or descent, except by amending or repealing section 2169 of the Revised Statutes. We have but to suggest an attempt to so repeal this statute, to realize the overwhelming protest that would prevent any such action by Congress.

It would seem to have been the part of wisdom and statesmanship during the years of rather strained diplomatic relations between this country and Japan for our President to insist that the law be left as it is, rather than to place upon the statute books an unnecessary express prohibition against Japanese naturalization.

It would also seem to us to be a most unfortunate situation if the theories of counsel should prevail so as to necessitate such prohibitory congressional action.

That such legislation would result if such a situation were created is inevitable.

Counsel quote at pages 25 and 26 of their brief in the *Ozawa* case language by United States District Judge Morrow, *In re Gee Hop*, 71 Fed., at pages 274 and 275. The only thing decided in this case was that a Chinaman was not entitled to be naturalized. Counsel would seem to draw the conclusion from the language quoted that Judge Morrow intended to say that the Chinese are the only people that belong

to the Mongolian race. The mere statement of such a proposition would seem, we respectfully submit, to be sufficient answer to the claim that Judge Morrow ever held such an opinion.

We submit that portion of counsel's brief, pages 27 to 32, dealing with the Immigration Act of Congress of February 5, 1917, as a very good premise for a conclusion opposite to that drawn by counsel for petitioner. It shows that the Japanese themselves in their objection to having the prohibition of immigration extended to those ineligible to citizenship in the United States, realize, as of course Congress realized, that they were ineligible to citizenship.

This was simply another case of a cautious Congress, and statesmanship, which under all the circumstances may have been a wise statesmanship, yielding to a sensitive people who prefer that their status with reference to immigration and naturalization remain as it has been for years. This, rather than an unnecessary affront perpetrated by the American government. To argue from this that Congress intended to recognize the Japanese as eligible to citizenship, seems to us a most unreasonable interpretation of the debates and of all contemporary history.

The Supreme Court of Washington in *In re Yano-shita*, 70 Pac. at page 482, refuses to follow the argument of counsel to the effect that the expressed exclusion by act of Congress of Chinese from the rights of

naturalization implies a right in the Japanese to be naturalized.

See also

Benda vs. U. S. 175 Fed. 245, *infra*.

In

In re Pa, 28 N. Y. Sup. 382,

the city court of Albany, New York, stated at page 384 that the act of Congress of 1882, denying citizenship to Chinese "seems to have been an unnecessary enactment, simply declaratory of the existing conditions, * * *"

This court also decided, in the said case, that the Burmese, being of the Mongolian race, were not entitled to naturalization.

The same rule as to the proper construction of the act of 1882 is expressed in

In re Kauleh Nim, decided by the Supreme Court of Utah, Vol. 21 Pac. p. 992.

Counsel for petitioners in the *Tanahiti* case, at page 4 of their brief, cite *In re Ah Yap*, 5 Savy. 117, Fed. Cas. No. 104, as authority for the point that during the interim between December 22, 1875, and February 18, 1875, when through inadvertence the expression "white persons" was omitted from the naturalization statute, it was held by the courts that Chinese were eligible to citizenship. While such was the law, this citation of the *Ah Yap* case is erroneous. It was decided in 1878 and as authority for the point



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 3

that at that time and prior to the statutory prohibition against naturalization of Chinese as contained in the act of 1882, Chinese were not eligible to citizenship.

The same error is made by the court in its citation to *In re Ah Yup* as authority for this point in the case of *In re Ah Chong*, 2 Fed. 733, at p. 739, and which case of *In re Ah Chong* is also cited by counsel at page 4 of their brief.

III.

THE SCIENTIFIC QUESTION OF THE RACE OF THE JAPANESE PEOPLE. BY THE OVERWHELMING WEIGHT OF RECOGNIZED ETHNOLOGICAL AND ANTHROPOLOGICAL AUTHORITY, THE JAPANESE ARE OF THE MONGOLIAN-MALAY, OR "YELLOW-BROWN" RACE.

At the end of the eighteenth century the German scientist Blumenbach, the first great ethnologist, published a treatise which was translated into English at the beginning of the nineteenth century. In this work Blumenbach divided the human race into five great classes:

The white or Caucasian; the black or Ethiopian; the yellow or Mongolian; the brown or Malay; the red or Indian.

This classification of the human race has persisted throughout different scientific writings and particularly in popular usage, to the present day.

There have been certain modifications made by some of the later scientific authorities. The most recent and best recognized variation reduces the classification to three divisions, by eliminating the brown and the red races as distinct branches, and combining these two with the Mongolian in a division generally referred to as Mongolian-Malay, or yellow-brown. It is to this division that the overwhelming weight of authority assigns the Japanese race.

There was a hearing before the Committee on the Territories, House of Representatives, held on July 17, 1922, and regarding anthropological and historical data affecting nonassimilability of Japanese in the Territory of Hawaii and the United States.

These proceedings have been printed in pamphlet form by the Government Printing Office and they include testimony given by Dr. Ales Hrdlicka, curator of the Division of Physical Anthropology, National Museum, Smithsonian Institute. Dr. Ales Hrdlicka is probably the best known and ablest anthropologist in the United States, and therefore the best qualified to testify on the question of the race of the Japanese. He was asked at page 11 of these printed proceedings, "Are the Japanese in any way descended from the Aryans?" His answer at page 12 is as follows:

"In no way whatsoever. No Aryans, so far as known ever reached even so far as the more eastern part of central Asia. They extended from about

1200 B. C. onward from or through the regions now comprised in southern Russia into Medea, Peria, and India. There are no traces that they ever reached in any numbers even as far as what is now known as the Chinese Turkestan, and no trace exists of their ever having penetrated farther east. The Japanese, according to all indications, had already reached the Japanese Islands before the first movements of the Aryans from Europe took place.”

Dr. Ales Hrdlicka's testimony is given at page 2 and following of this pamphlet. It is a most scientific analysis of the racial characteristics of the Japanese people and is as convincing a document as we have examined to show that the Japanese are of the yellow-brown race. We particularly recommend to the court the reading of this testimony. It is too long to give in full in this brief, but we shall quote extensively therefrom. In addition to this testimony, we also respectfully suggest to the court that the pamphlet contains as complete a digest from the ethnological and anthropological authorities on this subject matter as we have seen.

At page 12 of this document is given a quotation from “Who's Who in America,” 1920-21, giving a biography of Dr. Ales Hrdlicka, which shows the very great learning and high scholastic standing of this authority.

Following is a quotation from the testimony of Dr. Ales Hrdlicka:

"The Chairman. Are the Japanese people a distinct race of people, a race distinct and apart from the rest of mankind?

Doctor Hrdlicka. The Japanese people are not a distinct race. They may be called a distinct group, but they are merely a part of the yellow-brown people or race.

The Chairman. Are the Japanese people a legitimate part of the yellow race?

Doctor Hrdlicka. The Japanese people are an inherent part of the yellow-brown race.

The Chairman. Would it be at all possible to regard the Japanese race as a white race, or a Japanese as a white person?

Doctor Hrdlicka. None of the reliable scientific men of Japan itself nor those of anywhere else have ever attempted to make any such classification; they all, without exception, class the Japanese as yellow-brown or mongoloid people.

The Chairman. Please give the reasons for such classification.

Doctor Hrdlicka. In the classification of the human races the main criteria are the physical characteristics of peoples, which are, of course, the essential characteristics. We are guided by a large number of features, both of the living as well as of the body remains, and where it is found that a majority of the features that are important agree in two or more ethnic groups, we are naturally obliged to class those groups into one strain or stock, or one variety, or one race—all of these

terms being interchangeable and used for each other.

In the case of the yellow-brown people we find that all of them, including the Japanese, are characterized by a color range of skin which ranges from tawny to dark brown and we therefore call them yellow-browns. We find, in the next place, that all these people are characterized by black and straight hair. This hair, moreover, under the microscope on a cross section, shows a roundish outline, while the outline of the hair of the white man is, on the average, oval, and that of the hair of the black is flattened. In the third place, we find that all the yellow-brown peoples, the Japanese included, show a scarcity of hair on the body and also a sparse and shorter mustache and beard, which even in the cases where it is best developed does not come up to the average of the white man. In the fourth place, we find that the yellow-brown people, and the Japanese especially, are characterized in a large majority of cases by more or less peculiar eyelids, the peculiarity consisting in a fold from the upper eyelid over the inner corner of the eye on each side, a fold known as the epicanthus. This condition is found in white people and negroes only very exceptionally, and then only in the young.

In the yellow-brown peoples it is more or less common, according to the group, even in adults. It is particularly prevalent in the Japanese and the Chinese. This is a condition which gives rise to the term 'oblique' or 'Mongolian' eye. As a matter of fact, the eye is not oblique, but on account

of the peculiar formation of the upper eyelid the slit between the two lids becomes more or less oblique, the outer corners being higher than the inner. The whole constitutes one of the most obvious of the so-called mongoloid characteristics, and, together with the color of the skin and characteristics of the hair, is quite sufficient to entirely differentiate the peoples possessing them from the whites and placing them among the 'Mongoloids' or yellow-browns. In the fifth place, we have a remarkable feature which is common to a large percentage, or to from 50 to 80 per cent, of the yellow-brown peoples, and which is rare among white peoples and also black peoples, amounting to only a few per cent in either—and that is a peculiar hollow nature of the buccal surface of the upper incisor teeth, and particularly the medians. This condition of the teeth I described in the *American Journal of Physical Anthropology*, which may be referred to for the details.—Hrdlicka (Ales): Shovel-shaped teeth. *Am. J. Phys. Anthropol.*, 1920, Vol. III, No. 4, pp. 429-466.

In the sixth place, the Japanese and all the other members of the yellow-brown race differ from the whites and also from the blacks, but especially from the whites, in the various features of their face. Their face is flatter, the lips, due to a slightly greater prognatism, are frequently somewhat fuller; the nose, especially in the Japanese, is commonly smaller and of a different contour, the glabella region (the region above the root of the nose) is flatter, as compared with the

averages in the white race. Naturally these features do not hold equally good for all the branches of the large yellow-brown race, such as some of our Indians.

The Japanese and other yellow-brown peoples differ also from the white people in various other physical characteristics, and apparently they also differ from them, more or less mentally. These more detailed, and especially the psychological features are difficult to define without technical language, or with finality, many of them being still under investigation.

The Chairman. But they do exist?

Doctor Hrdlicka. There are indications to that effect.

The Chairman. Can you therefore state positively that the Japanese are not white people?

Doctor Hrdlicka. There can hardly be anything in anthropology more positive than the fact that, on the whole, the Japanese are yellow-brown, or Asiatic, or 'mongoloids'; though the Japanese, just like the Chinese, the Koreans, and all other branches of the yellow-brown people, like the larger groups of our own race, contain some foreign admixture. * * *

The Japanese have in their veins—just as the Chinese have, just as doubtless the Koreans have, or the Mongolians, or Siberian Tartars have—some blood that may be called white, but the quantity of this, on the whole, is so small that except in a few families it is wholly imperceptible, and, of course, can not change the racial status of the people.

The Chairman. What proportion of white blood would you say was in the modern Japanese race?

Doctor Hrdlicka. The proportion of white blood differs according to classes and according to districts. In by far the larger part of Japan, where the contacts have been nil or very small between the two races, the mixture is practically nil; in the port cities it may amount, at the most liberal estimate, to perhaps something like 5 per cent; in individual families it may, of course, be as high as 50 per cent.

The Chairman. Taking the Japanese race as a whole, what would the white blood average, in your opinion?

Doctor Hrdlicka. Not more than, say, that of the negro blood among the Mediterranean whites. In a large part of Japan there has been no contact whatever with whites and the people are not admixed. In places like the general districts of Tokio, Yokohama, Kobe, Shimonoseki, and the Kurile Islands, white people have had more access and there is some mixture. A trace of white blood remains probably in some of the Japanese as a result of their old admixture with the Ainu, but this must be small, for the number of thus incorporated Ainu was according to all accounts, not a large one.

The Chairman. Did the Ainu people originally occupy all the islands of Japan?

Doctor Hrdlicka. With the remnants of the preceding people they occupied, according to evidence so far unearthed, all of the islands, but in a sparse way.

Mr. Swing. How many would you estimate?

Doctor Hrdlicka. I would not tell you that; but at most probably not over a few tens of thousands. Their remains, while widely spread, are not abundant.

The Chairman. As I understand there are about 2,000 left?

Doctor Hrdlicka. There are only a few hundred left of pure blood. Personally I think there are not over 200 or 300 pure bloods left, and even that may be too great an estimate.

* * * * *

The Chairman. Could the Ainu be possibly regarded as whites?

Doctor Hrdlicka. No; but they are probably partly whites and partly yellow-brown. * * *

One or two wanted to make a new race out of them; one or two proposed to regard them as white, and some consider them simply yellow-brown with aberrant characteristics. However, I think the best scientific opinion today would be that they are merely an ancient mixture of the two yellow-browns and some old whites, both of which to some extent are manifested in their present-day appearance.

The Chairman. But they are not white people?

Doctor Hrdlicka. They are certainly not white people.

The Chairman. And could not be classified as free white people?

Doctor Hrdlicka. Not without doing violence to the facts. Their most serious students, such as Koganei, Torii, Torok, have never attempted such a classification.

The Chairman. Have you studied the Ainus as a scientist from skeletal remains, books, etc.?

Doctor Hrdlicka. Yes, sir.

The Chairman. Would you say that they are Caucasian or Mongolians?

Doctor Hrdlicka. I should say they are intermediate people, a result of ancient mixture of the two.

The Chairman. What would the preponderance of blood be?

Doctor Hrdlicka. That is hard to say; but possibly somewhere near half-and-half.

The Chairman. Would you classify them as part of the white race or of the yellow race?

Doctor Hrdlicka. They are neither pure whites nor pure yellow-browns, and should not be classified with either race.

The Chairman. They are like the mulattoes in this country?

Doctor Hrdlicka. Yes, sir; they are intermediates.

* * * * *

The Chairman. What percentage of the Ainu blood would you say appears in the Japanese of today?

Doctor Hrdlicka. That is impossible to say; but it is not large.

The Chairman. Is it an appreciable amount?

Doctor Hrdlicka. It is not plain, and many Japanese have probably no such blood. Some might say there was Ainu blood in those Japanese who have larger beards for there are occasionally Japanese who are fairly well bearded; but even in these cases the beard shows the essential

characteristics of the yellow-brown man, and it is doubtful if it has been influenced by any Ainu mixture.

The Chairman. But even of these the percentage is small?

Doctor Hrdlicka. The percentage is certainly in the minority.

The Chairman. There would not be over 1, 2, or 3 per cent of the Ainu blood in the Japanese at the present time?

Doctor Hrdlicka. I do not see how there could be any more, if that much.

The Chairman. It would not change the Japanese people in any regard or in any number from Mongolians or yellow-brown to white?

Doctor Hrdlicka. No, sir. It would no more change the Japanese than a similar admixture, for instance, changes the Mongolians proper, or the Chinese, or the Malays, all of whom have some admixture of white blood.

* * * * *

The Chairman. Please tell us something regarding your observations of the skin of the Japanese and of their color.

Doctor Hrdlicka. The Japanese range from yellowish white to dark brown. The predominant shades are tawney to medium brown.

The Chairman. What Japanese scientific authorities can you name that consider the Japanese people as belonging to the mongoloid or yellow-brown race?

Doctor Hrdlicka. I would say, in a word, all of those who have been occupied in Japan in a really scientific way with the anthropology of

their people. Those that I may name offhand are Koganei, Tsuboi, Torii, Kaneka, Ogura, Matsumoto, Adachi. The statements of these authorities are not always direct, but they are all to the same end and purpose. No reputable man of science in Japan has ever claimed that as a group the Japanese were anything else than yellow-brown or 'Mongolian.'

* * * * *

Doctor Hrdlicka. The most important cranio-logical differences between the three different races are essentially those of the face. In the yellow-brown peoples, as contrasted with whites, we find that the face is, on the whole, more flat; that the malar bones are, in general, larger and more protuding; that the region above the eyes, and especially above the region of the nose, is characteristically flatter—which is especially the case among the Chinese and Japanese; the nasal aperture in the yellow-brown races, except those in the northernmost regions (Eskimo), is generally wider than it is in the whites; and the protrusion of the upper dental arch forward (alveolar prognathism) is on the average somewhat greater in the yellow-browns than in the whites. In addition there are many differences between the skeletal remains of the two races, but these become apparent only in studies of large series of specimens. And there are certain anomalies, such as, for instance, the *os japonicum*, which are more frequent in one race than in the other. * * *

Doctor Hrdlicka. There has been but very slight admixture of that nature, considering the number of Japanese. The Japanese have for a

long time excluded the whites, and they had also the isolation afforded by great distance.

The Chairman. They prohibited immigration of other races into Japan, and they had not intercourse with the outside world, outside of Korea and China, for many hundreds of years, until it was opened up by Perry in 1856?

Doctor Hrdlicka. Yes.

The Chairman. For a thousand and more years before Perry's coming there was no appreciable admixture of blood with whites on account of the isolation of their country and their prohibition of immigration?

Doctor Hrdlicka. Yes, sir. During two thousand years and over they were mixing only with the people of Korea and China.

The Chairman. You mentioned the lack of hair on the face of yellow-brown people. Is there any noticeable lack of hair on other parts of the body?

Doctor Hrdlicka. Yes, sir; I mentioned that also, I believe. There is a general scarcity of hair in the yellow-brown people on the body. There is hair on the pubis, but it is not as profuse as in the people of the white races.

The Chairman. Doctor, do you believe that the assimilation of the Japanese is possible in this country by the process of intermarriage?

Doctor Hrdlicka. In answer to that I may only say this: It is not impossible, but evidence shows that a Japanese assimilates with considerable difficulty; he learns the language with difficulty; his mentality appears to be somewhat different; he is not what one would call a 'good mixer.' This

is observable to some extent even in Asia among the people with whom he is closely related.

* * * * *

The Chairman. Neither the Filipinos, the Malays, the Chinese, the Koreans, nor the Japanese, nor the Mongols, nor the Siberian tribes, can be classed as whites?

Doctor Hrdlicka. No.

The Chairman. They all belong to the yellow-brown race?

Doctor Hrdlicka. They all belong to the yellow-brown or mongoloid race.

The Chairman. Why is the race called 'mongoloid,' Doctor?

Doctor Hrdlicka. It is called 'mongoloid' because of the great prominence that the Mongols assumed in the Old World by their invasions of eastern and central Europe and Asia Minor, particularly in the thirteenth century.

The Chairman. That is the reason they are called a mongoloid race?

Doctor Hrdlicka. Yes. The Mongols having made such an impression upon the white people of Europe, subsequently all Asiatic peoples showing their physical characteristics were called mongoloid peoples. That is how the term 'mongoloid' race came about. It does not mean 'derived from Mongols'; Mongols are but one of the larger groups of the great yellow-brown race.

The Chairman. The term 'Mongolian' was applied to all of the yellow-brown people?

Doctor Hrdlicka. To all of the yellow-brown people, yes; except that originally the Malays and the American Indians were kept separate,

until they were sufficiently studied and shown to possess the same basic characteristics, and to have come from somewhere in Eastern Asia."

Prof. Yoshi S. Kuno, ethnologist and acting head of the Department of Oriental Languages and Literature at the University of California, Berkeley, California, has recently written a most scholarly and interesting article on "The Racial Origin of the Japanese." Prof. Kuno is a Japanese. At the time of writing this brief this article has not yet been published. We, however, have had the advantage of reading an advance copy thereof and shall now quote therefrom with the assurance that it is as scholarly and instructive an article as we have read on this subject. It will be noted with what positiveness Prof. Kuno rejects the theories of those who without any scientific basis have urged that the Japanese are of the Caucasian race. Prof. Kuno after discussing Japanese mythology and referring to the Tenson race, one of the primitive races of Japan, continues as follows:

"Modern historians believe that this race came from the South Sea Islands, or from Malay, or from India. From the foregoing myth, we can readily see that there is some resemblance between Japanese mythology and that of the Greeks and that of India. Besides this Tenson race, another race came from a foreign country. This race probably came from Mongolia through Korea and landed on the west coast of Japan in

the province of Izumo in Honshu. This race is known as the Izumo race. At any rate the Tenson race and Izumo race amalgamated and formed the modern Japanese race. Therefore the Japanese are fully agreed that the modern Japanese are not the aborigines of Japan, but that they were immigrants from foreign countries. When these races landed in Japan, they found the country inhabited by numerous tribes, among which the Ainu and the Kumaso were the most powerful. The Ainu race occupied Sakhalin, Yezo, and most of the Island of Honshu. The Kumaso race controlled almost the entire island of Kyushu, and also exercised some control in Shikoku. The Tenson race remained in a small district in the south end of Kyushu island for three generations. * * * The Ainu, though still persisting at the present time in the northern part of the island of Yezo, however, like the American Indian are a dying race. The Japanese government looks after the Ainu just as the American government looks after the American Indian. It gives them every possible protection yet their numbers are steadily decreasing. At the present time, the total number of Ainus who live in Japan scarcely reaches 15,000. They are at present like the American Indian, rather mild and spiritless, and possessed by a strong desire for liquor. Above all, they are noted for being dirty. The habit of bathing is not only entirely unknown among them but it never even occurs to them to wash their hands and faces. Dr. Batchelor, who is a sympathetic friend of the Ainu as well as a prominent American scholar, has made

the study of the Ainu race his life work. He states in his book that on one occasion he lived with an Ainu family for a month and one-half, while on another occasion he stayed with another Ainu family for two months. During all this time, he never saw the Ainu either washing themselves or their cooking or eating utensils. * * * The Ainus leave no traces of ever having possessed the art of writing or having had any art work. Yet, such prominent so-called Oriental scholars as Batchelor and Griffis believe that the Ainus are a branch of the Caucasian race. More recent investigation by modern scholars proves that the Ainu came from Siberia and crossed the narrow strip of water between the continent and Sakhalin, spreading thence to Yezo and Honshu. No matter whether the Ainu are of Caucasian or Asiatic origin, it has no particular bearing upon the racial origin of the modern Japanese, because there is no resemblance between the modern Japanese race and the Ainu who are still living in Yezo and Sakhalin.

* * * * *

Inhabitants of the Japanese Empire of the present day comprise besides about 100,000 Formosan barbarians, whose ancestors undoubtedly came from Malay, 3,000,000 Chinese in Formosa who were naturalized after the China-Japan war, and 17,000,000 Koreans in Korea who became Japanese subjects after 1910. The remainder of the people numbering about 55,000,000 belong to the modern Japanese race. * * *

The origin of the modern Japanese race is a most puzzling question. Most historians agree

that, as was stated in the preceding part of this article, the Japanese are an amalgamation of the Tenson and the Izumo races. However, the various scholars maintain different opinions regarding the origin of the race. From Japanese mythology and tradition, some historians have advanced the theories of Greek and Egyptian origin, while others have demonstrated to their own satisfaction that the Japanese originally came from Babylonian or African stock. Though up to the present time, different historians have thus presented various theories, yet they have been unable to furnish any conclusive evidence in support of those opinions. All historians are, however, agreed that the modern Japanese are one of the most greatly mixed races in the world. The main branches of the Japanese race are generally believed to be Mongolian element that started from Mongolia, passed through Manchuria and Korea, and finally entered Japan. The other main stream of immigrants is believed to come either from Malay or the South Sea Islands. These probably either followed the ocean currents or were carried by the storm. They pursued a northeasterly course, touching at Canton and Formosa, and finally reaching the southeastern part of the Kyushu Islands. Those who have visited the southeastern part of the Kyushu Islands and the Izumo district have found there abundant evidence to prove the landing there of these immigrants. Furthermore there is great similarity between the traditions of the early Koreans and the Japanese. Therefore such prominent historians as Dr. Kume insist

that the Japanese, the people in the southern part of China and in Korea must be of the same race. However, the race that came from the south and the race that came from the continent may even today be traced through the physical characteristics of the Japanese people. One traveling through Japan soon discovers that there are two prevailing types of faces among the Japanese. One is oval and the other round. The oval face is most commonly found among the high class of Japanese. The skin of these people ranges in color from a yellowish brown to a cream white. Most of the people with the oval faces have small faces and narrow, oblique eyes, with slightly Roman noses. This type probably represents the people who came from the Korean stream. Those with round faces, have dark skin, prominent cheek bones, large mouths, and rather round eyes, with short, flat noses. This round face people must be of Malay or South Sea origin. They are usually found among the lower or farmer class in Japan today.

However, no matter what proportion the Korean and Malay or South Sea or Indian blood may have been in the original Japanese race, or no matter what proportion of other racial elements has been mixed with the Japanese blood, it is undeniable that in the veins of the present Japanese race, Chinese and Korean blood prevails. After the Japanese government had been fully organized, wave after wave of immigrants poured almost incessantly into Japan from both China and Korea. In ancient times, Korea was divided into many small kingdoms which were constantly at

war with each other. Also throughout the history of China, numerous national disturbances that brought about a change of dynasty frequently took place. Therefore those defeated ruling families in China and in Korea together with their followers and sympathizers generally escaped to Japan and established new homes. They took Japan as their new home for two reasons. First, it was the custom in those days for the conquering dynasty to seek to destroy all members of the preceding ruling family and their supporters. Second, Japan was then in a very primitive stage of civilization when compared with China or Korea. Therefore the Chinese and Koreans who established themselves in Japan were not only able to dwell there in safety, but they became leaders in intellectual and industrial work in Japan. They were even appointed to prominent government positions. The Chinese and Koreans not only escaped to Japan in order to save their lives, but even in time of peace, Japan often invited Chinese or Koreans skilled in certain lines of industry to come to live in Japan. Japanese history records that about the third century A.D. the Japanese government invited Chinese whose homes were in the Wu district near the present city of Shanghai to introduce the art of weaving and the manufacture of dry goods. Therefore even today all dry goods are known in Japan as 'Wu goods,' which means the sort of goods introduced from the Wu district in China. In the fourth and fifth centuries, most of the prominent officers who undertook intellectual and literary work were either Chinese or Koreans or

their descendants whose ancestors had emigrated to Japan. In the middle of the fifth century, when an industrial census was taken, a family called Hata together with its branch families who had originally emigrated from China to Korea in the fourth century, and who then came to Japan, numbered 18,670 heads of families. They claimed that they were the direct descendants of Hsi Hwang Ti, the emperor who completed the great wall of China. This family introduced silk culture technically known as sericulture. The Japanese government requested these people to supervise the silk production and manufacture in all parts of Japan. For many centuries after taking up this work, this family was both financially and politically the dominant power in Japan as late as the ninth century. Even today the Hata family is prosperous, and has branches in many different districts in Japan. Originally, this family came to Japan about the third century, bringing the entire population from 127 districts. In much the same way about the fourth century the descendants of the Han Emperor came to Japan bringing with them the entire population of 17 districts. Of course they came from China through Korea. Countless Chinese and Koreans immigrated to Japan and established themselves there in intellectual and industrial undertakings, such as ship building, medicine, pictorial art, music, lacquer work, and the art of irrigation. In 665 and 669, so many Koreans immigrated to Japan that the government allotted to them the Province of Omi for their place of residence. In 666, several thousand Koreans came to Japan. The government

allotted to them the Province of Musashi. Thus for many centuries a county called Korea existed in Japan. In 797, the Ainu made a final stand against the Japanese. At that time, the emperor appointed a man who was a direct descendant of a Chinese ruler, as commander of the entire army. Owing to his wonderful genius and ability, the Ainu were finally driven from the island of Honshu. After his death, the Japanese built a most magnificent tomb, known as "The Tomb of the Commander-in-Chief." Whenever any important national event took place, the Japanese used to go to worship at this tomb, beseeching the spirit to protect the nation. From the thirteenth to the fifteenth centuries, one of the most powerful military families called Ouchi, practically controlled the most important part of Honshu island. This family were descendants of a Korean king. In 815, an official census was taken of the prominent families that lived in the five provinces surrounding Kyoto, then the capital of the empire. The result of this census which was published in a book that is still extant today, shows 1,180 distinguished families. Of this number, 360 were the descendants of the Japanese imperial family, 450 were families the ancestors of which had come to Japan with the imperial family at the time of the foundation of the empire, 370 were noble families whose ancestors had come from China or Korea. From these statistics, it may be estimated that in the ninth century, about one-third of the ruling families were descendants either of Chinese or Koreans. It is also an undeniable historical fact that notwithstanding the fact the

Japanese lay great stress upon the sacredness and purity of the blood of the imperial family, still Korean blood has been infused into it through the mothers. In order to maintain the purity and sacredness of the imperial blood, it was a long-established tradition in Japan that the emperor should marry no princess but one of the imperial blood. Notwithstanding that this custom was jealously and strictly adhered to, prior to the ninth century, four emperors took empresses who had Korean blood. For instance, the Emperor Ojin who ruled Japan about the beginning of the third century, and who is even today worshipped as the god of war, was born to an imperial princess who was the direct descendant of a Korean princess. The Emperor Kammu who is second in fame among the emperors of Japan, and who was the founder of the capital at Kyoto, was born to a woman who was a direct descendant of the king of Korea.

In this way both the higher and lower classes of Chinese and Koreans immigrated to Japan as late as the ninth century. Such being the case, intermarriage between Japanese and the Chinese and Korean immigrants became very common in all ranks. Therefore no matter from what stock the Tenson race and the Izumo race may have come in the beginning, at the present time, it is an undeniable fact that there is a strong infusion of Mongolian blood mixed with that of all classes of Japanese. Therefore the modern Japanese should feel just as proud as the Chinese and the Koreans of the fact that they belong to the Mongolian race.

From a social and from a historical standpoint, if one discusses the origin of the modern Japan-

ese race, it is right to compare it to the origin of many nations in South America. No matter what sort of races such as the Incas and many other early races that inhabited South America may have been, the present population of South America may be looked upon as descendants of the Spanish and the Portuguese. Furthermore their civilization is nothing but the Latin civilization transplanted. The same thing holds true of Japan. The present Japanese population is composed largely of descendants of Chinese and Koreans. The so-called pure Japanese civilization was really established by introducing Chinese and Korean civilization into Japan. Notwithstanding that such is the case historically, certain Japanese who live in the United States for personal or business reasons, have brought cases before United States courts asking the right of naturalization, basing their plea upon the fact that the Japanese belong to the Caucasian race. If such Japanese had either a little historical knowledge of their own country or a little conscience, they would be ashamed. At the same time they should know that the Japanese in Japan greet both Chinese and Koreans with the words, "We belong to the same race and are people who use the same characters." However, after the 9th century, Japan practically remained secluded within her own limits for a period of about 1,000 years. During this long era of seclusion, with the exception of a period of about 100 years from the middle of the 16th to the middle of the 17th century, during which time the Japanese

came into contact with Occidental civilization through the Portugese and Spanish, the various races that had taken root in Japan lived together in seclusion, and became amalgamated into what is now known as the Japanese race. They worshipped the Imperial ancestor as the supreme God of the land, and the ruling Emperor as the representative of that God. Because the people thus became so intermingled, their original differences in race, manners, and characteristics were entirely fused. Out of this melting pot emerged the modern Japanese race which is entirely unlike any other race on the face of the globe. It is also the most homogenous race in the world, being bound together by bonds of theical unity, patriotism, and national pride. Therefore the Japanese are Japanese, as distinct from the rest of the world. However, if one would like to know to which race the Japanese belong, it is safe to say that the Japanese belong to the Mongolian race.

In concluding this rather interesting and important subject, I would like to quote two statements of two of the foremost scholars in Japan, both of whom are recognized as authorities on this subject. Dr. Fujioka states in Vol. I of his *History of Japanese Customs and Traditions*, “* * *”.

As to the race which is supposed to have descended from Heaven, among prominent scholars we find two trustworthy opinions. One is that they were originally of the Mongolian race, and from Mongolia they went to Manchuria and then proceeded southwest. From there they went to the northeastern part of China. Then they

entered Korea and finally they reached the southern part of Japan. The other opinion is that those races were originally Malayan. They were carried either by the currents or the storms in a northeasterly direction. Then passing along the coast of Formosa, they finally reached Kyushu Island. I can not say which opinion is correct. However, it may be right to say that the modern Japanese race is a mixture of the Mongolian and the Malay races. But some Japanese scholars state the original Japanese came from Polynesia in the South Sea. From there they came to Japan. Other scholars who hold radical views say that the Japanese are a branch of the Babylonian people who were scattered all over the world after the fall of Babylon. Others say that the Japanese are nothing but Jews who were scattered all over the world, some of whom reached Japan. These opinions are entirely groundless and are not worthy of attention. * * *

Dr. Kume is the foremost scholar on the subject of the racial origin of the Japanese. In his *Ancient History of Japan*, Vol. I, he writes, * * * In my opinion, the modern Japanese must have come from the Asiatic continent. In the primitive period of history, China, Korea and Japan existed. In those periods, water separated those countries, but it was very shallow and was bridged by numerous small islands. Therefore the continental people immigrated to Japan from one island to another. This opinion can be verified by many ancient articles which have been handed down to the present generation. We often excavate stone arrows and copper vessels, near the

present city of Kyoto. The same things are to-day found in Manchuria particularly near the Amur River. Japan has a particular kind of jewel which has been handed down from the ancients; and often we excavate coffins made of chinaware. These are believed to have come from the southern part of China. The Japanese race is generally divided into the North Race and the South Race. By recent investigation, we find that the so-called North Race came from Sakhalin and Yezo Island and went down toward the South. The other race probably came from the South Sea Islands and proceeded eastward. These two races came into collision and were finally amalgamated. This fact can be verified by the physique, the bones, the customs, and the manners of the Japanese of the present time. In a word, we may say that both of these races originally came from China and the Korean peninsula.' "

SENATE DOCUMENT NO. 662, VOL. 9 OF THE 61ST CONGRESS, THIRD SESSION, 1910-1911 IS A "DICTIONARY OF RACES OR PEOPLES," INCLUDED WITHIN THE REPORTS OF THE IMMIGRATION COMMISSION.

From this very scientifically prepared report we shall quote several definitions of different races or peoples.

"CAUCASIAN, CAUCASIC, EUROPEAN, EURAFRICAN, or WHITE RACE. (See *xanthochroi* and *melanochroi* races, p. 31.) The

name given by Blumenbach in 1795 to the white race or grand division of mankind as distinguished from the Ethiopian, Mongolian, American, and Malay races (see these). The term is now defined more suitably for our purposes in a broader sense by Brinton and Keane, namely, to include all races, which, although dark in color or aberrant in other directions, are, when considered from all points of view, felt to be more like the white race than like any of the four other races just mentioned." (Senate Document No. 662, p. 30.)

"**ARYAN, INDO-EUROPEAN, INDO-GERMANIC, INDO-CELTIC, CELTO-GERMANIC, JAPHETIC, or SANSCRITIC.**

* * * * *

It will be seen that the words 'Aryan,' 'Indo-European,' and the like are linguistic rather than ethnological. Yet there has been much written, especially among the earlier philologists, about an 'Aryan race.' " (Senate Document No. 662, p. 17.)

"**MONGOLIAN, MONGOL, MONGOLIC, MONGOLOID, ASIATIC, or YELLOW RACE.** That grand division of mankind which is typically, as to color, and present habitat, Asiatic.

* * * * *

Brinton divides the Mongolian race into two great branches, the Sinitic and Sibiric. The former is the more populous, and is confined to Asia, being subdivided into the Chinese, Indo-Chinese, and Tibetan groups. The Sibiric branch includes all the invaders into Europe above mentioned, who are therefore more closely related linguistically to the Japanese than to the Chinese.

This branch includes, besides the Japanese, Arctic, and Tungusic groups, the Finic, Tartaric, and Mongolic. It is the three last-named groups that are represented in Europe; the Finnic by the Finns, Lapps, Esths, Livs, Mordvinians, and others of Russia, and the Magyars of Hungary; the Tartaric group by the Kirghiz-Kazaks, Turkomans, and kindred tribes in Russia, and the Osmanlis or Turks of Turkey; and the Mongolic group by the Kalmuks of eastern Russia. (See articles on the above and summary under Ural-Altaic.)

Southwestern Asia is practically occupied by Caucasians, with the exception of the Turkish race in Anatolia (Asia Minor). West of the Hindus come their Aryan kinsmen, the Afghans, Beluchis, Persians, Armenians, and Kurds, many of whom are Mohammedan; then come the Semites, including the Jews, Arabs, and Syrians." (Senate Document No. 662, p. 97-98.)

"SIBIRIC. That branch of the Mongolian race which comprises the Japanese, Arctic, Tungusic, Finnic, Tartaric, and Mongolic groups, and therefore all the Mongolian peoples which have invaded Europe, such as the Finns, Lapps, Magyars, and Osmanlis or Turks (see these)." (Senate Document No. 662, p. 127.)

"JAPANESE. The people of Japan.

With the exception of the 'Arctic group' the Japanese and Koreans form the easternmost group of the great Sibiric branch, which, with the Sinitis branch (Chinese, etc.), constitutes the Mongolian race (see these terms). As was said in the article on Chinese, the Japanese and Kor-

eans stand much nearer than the Chinese, especially in language, to the Finns, Lapps, Magyars, and Turks of Europe, who are the westernmost descendants of the Mongolian race. The languages of all these peoples belong to the agglutinative family, while Chinese is monosyllabic.

Although many people may mistake a Japanese face for Chinese, the Mongolian traits are much less pronounced. The skin is much less yellow, the eyes less oblique. The hair, however, is true Mongolian, black and round in section, and the nose is small. These physical differences no doubt indicate that the Japanese are of mixed origin. In the south there is probably a later Malay admixture. In some respects their early culture resembles that of the Philippines of today. Then there is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian-like people in appearance in eastern Asia. They have dwindled away to less than 20,000 under the pressure of the Mongolian invasion from the mainland, but they have left their impress upon the Japanese race. The 'fine' type of the aristocracy, the Japanese ideal, as distinct from the 'coarse' type recognized by students of the Japanese of today, is perhaps due to the Ainu." (Senate Document No. 662, pp. 85-86.)

"MONGOL or MONGOLIC. The subdivision of the Sibiric branch of the Mongolian race or grand division of mankind from which the latter has taken its name. They are interesting historically, in that at different times they have ruled India and still rule, through the Manchu dynasty,

China. In the thirteenth century, headed by the descendants of Genghis Khan, they penetrated into Europe as far as Germany. Their only representatives now in Europe are the Kalmuks (see) of southeastern Russia, a decadent stock.

* * * * *

“The Mongols or natives of Mongolia are comparatively unimportant in immigration and international questions, being small in number and located in the interior of Asia, back of China proper. Estimates of their population rate them at only from 2,000,000 to 5,000,000 in numbers, while of Chinese there are perhaps 300,000,000. The Mongols are not so closely related linguistically to the Chinese as they are to the Japanese and even to the Finns, Turks, and Magyars. The Mongols proper extend at present westward over waste regions as far as the Turko-Tataric populations of Russian central Asia. As they extend on the east nearly to Peking, a few may have found their way to the United States as ‘Chinese’ immigrants, from whom they are not easily distinguishable.” (Senate Document No. 662, p. 97.)

“SINITIC. That branch of the Mongolian race which comprises the Chinese, Indo-Chinese, and Tibetan groups. (See articles on these and on the Sibiric, the only other branch of the Mongolian race.) Not to be confused with the word ‘Semitic,’ a term referring to certain Caucasian stocks, as Hebrews and Arabs. The word ‘Sinitic’ is derived from the late Latin ‘Sina,’ China.” (Senate Document No. 662, p. 128.)

“CHINESE. The race or people inhabiting China proper. Linguistically, one of the Sinitic

groups of the Mongolian or Asiatic race. The name Chinese is also applied, erroneously from an ethnical standpoint, to all the natives of the Chinese Empire, including China power; that is, to the entire Sibiric group. These are, on the northeast the Manchus, on the north the Mongols, on the west the tribes of Turkestan and of Tibet. The name does not properly apply to the other Sinitic peoples—the Cochinchinese and the Annamese of the French colonies and the Burmese of the British colonies, all of whom border on China on the south and southwest. (See *East Indian*.) The people of Manchuria and of Mongolia are not so nearly related linguistically to the Chinese as they are to the Japanese (see). All these 'Sibiric' peoples have agglutinative languages, while the Chinese is isolating and monosyllabic, being more nearly related to the languages stretching from Tibet southeast to the Malay Peninsula.

The Chinese physical type is well known—yellowish in color, with slanting eyes, high cheek bones, black hair, and a flat face. The eye is more properly described as having the 'Mongolic fold' at the inner angle. This mark is found to some extent in all Mongolian peoples, in the Japanese, and now and then in individuals of the European branches of this race in Russia and Austria-Hungary." (Senate Document No. 662, p. 40.)

"INDO-CHINESE. A group of people constituting, with the Chinese and the Tibetan groups, the so-called 'Sinitic' branch of the Mongolian race. (See these and *East Indian*.) It is

confined to the southeastern peninsula of Asia, known as Farther India, and includes not only the Annamese (see), Cochin-Chinese, Tonkinese, and the Cambodians of French Indo-China, but the Burmese (see) of British India and the independent Siamese." (Senate Document No. 662, p. 78.)

"TIBETAN. A group of peoples inhabiting central Asia, and therefore of no importance in an immigration study. They are Mongolians and closely related to the Chinese (see these)." (Senate Document No. 662, p. 143.)

FIGUIER, in his "The Human Race" includes "the Japanese Family" as a part of the "Sinaic Branch" of "The Yellow Race," the other "families" being the Chinese Family and the Indo-Chinese Family. See pages 302 and following.

RATZEL in "The History of Mankind," Vol. III, page 455, quotes Bordier as assuming no less than six strains in the Japanese people, and "above all" Malays.

JAMES COWLES PRICHARD, in his "Natural History of Man," published in 1855, in Chapter IX, groups together the Chinese and the Indo-Chinese races. At page 234 of Vol. I he says:

"The Japanese belong to the same type as the Chinese; they resemble them in many particulars."

SIDNEY L. GULICK, a missionary of the American Board in Japan and one of the most friendly students

of the Japanese people, in his "Evolution of the Japanese," says, at page 35:

"that these conquerors" (who gradually took possession of Japan) "were not all of the same stock is proved by the physical appearance of the Japanese today, and by their language. Through these the student traces an early mixture of races—the Malay, the Mongolian and the Ural-Ataic."

BARON CUVIER, in "The Animal Kingdom," published in 1827, refers, at page 96 and following of Vol. I, to three varieties of the human species which particularly merit attention. He describes them as:

1. The fair or Caucasian variety;
2. The yellow or Mongolian;
3. The negro or Ethiopian.

At page 97 he says:

"The Mongolian variety is recognized by prominent cheek bones, flat visage, narrow and oblique eyes, hair straight and black, scanty beard, olive complexion. This race has formed mighty empires in China and Japan * * *."

In Japan it is the common custom when Japanese meet with Chinese at any public gathering or banquet for the first word of greeting to be "Dobun Doshii," which means, "We are people who use the same language and belong to the same race." (Yoshi Kuno, in "What Japan Wants," p. 19.)

NELSON'S ENCYCLOPEDIA, article on "Ethnology," describes four divisions, A, B, C, and D, of the human race as respectively, Negro, Mongolic, American and Causasic. Division B, the Mongolic race, is divided into three sections:

- I. Northern (Mongol-Turki);
- II. Southern (Tibeto-Indo-Chinese);
- III. Oceanic (Malayan).

The "Northern" section is divided into:

- 1. Mongol;
- 2. Turki;
- 3. Finno-Ugrian;
- 4. Siberian;
- 5. Korea-Japanese.

Under this fifth section, Korea-Japanese are listed:

- (1) Korean;
- (2) Japanese;
- (3) Liu Kiu.

Dictionary definitions of "white" or "white persons" are necessarily very comprehensive and are given with reference to many usages other than the uses of lawmakers framing language in such statutes as we are considering.

It is of interest, however, to note among the definitions which are peculiarly applicable to such

legislative expression, defining white person: "White Person": "A person of the Caucasian race. (6 Fed. Rep. 256) * * *."

Webster's New International Dictionary.

The adjective "white" is defined in the Standard Dictionary as: "Having a light complexion. (1) Of the color of the Eurafrican or Caucasian race; opposed especially to negro, but often to the yellow, brown, or red races of men."

IV.

THE TRANSCRIPTS IN THESE TWO CASES INDICATE RECORDS WHICH DO NOT PERMIT OF ARGUMENT THAT POSSIBLY PETITIONERS MAY BE OF THE SO-CALLED "AINU" RACE, WHICH SOME AUTHORITIES BELIEVE TO BE A "WHITE" RACE.

At page 22 of brief for petitioners in the *Yamashita* case, to the so-called "Ainus" resident in Japan and claimed to be of the Caucasian or white race. It is stated that all that appears of record in this case is that petitioners were born in Japan, and they may have been pure blooded Ainus, and therefore entitled to citizenship.

There are some sixty million people in Japan proper.

(The Japan Year Book, 1920-21, page 28, by Professor J. Takenob of Waseda University, Tokyo, gives the population of Japan proper, October 10,

1920, as 55,961,140; and of the whole Empire, 77,005,510.)

Out of these sixty million in Japan proper less than twenty thousand are Ainus.

“They have dwindled away to less than 20,000 under the pressure of the Mongolian invasion from the mainland * * *.” (Senate Document 662, pp. 85-86, “Dictionary of Races or Peoples.”)

Wells, in his Outline of History, at pages 108 and 109, says:

“We find a wavy-haired, fairish-skinned race, the Ainu, in Japan. They are more like the Europeans in their facial type than the surrounding yellow Japanese. They may be a drifted patch of the whites or they may be a quite distinct people.”

If we assume that they are white, Wells' designation of them as a “drifted patch of the whites” well indicates the extreme to which counsel for petitioners has gone in suggesting that these petitioners might possibly be descended from some of the few remaining Ainus of Japan. They are but a handful of people as compared with the sixty odd millions of the Japanese race surrounding them.

Throughout this litigation it has been assumed, and of course correctly so, that petitioners are of the Japanese race. It will avail nothing, after all of the litigation herein, at this late date to argue from any other premise.

We do not understand that the presumption of the existence of jurisdictional facts to sustain judgment can be invoked in such a case as this.

So far as the *Ozawa* case is concerned the petition for citizenship was denied by the court. The application showed no more than that *Ozawa* was a native of Japan. The order of the court denying his petition stated that "It appearing that he is ineligible to citizenship," the petition is denied. There is therefore no judgment in that case upon which *Ozawa* can claim any possible finding to the effect that he is of the white race. Therefore the suggestion of counsel in their brief in the *Ozawa* case that the question certified is whether any Japanese at all are entitled to citizenship, if perchance there be Japanese of the white race, is not borne out by the record. We must read the questions submitted together with the transcript in the case. There was no showing made by the applicant that he was of the white race.

In the copy of the printed brief for petitioner in the *Ozawa* case which we are using, pages 32 to 49 are missing. We are endeavoring, at the time of the writing of this brief, to have these missing pages supplied. An examination of the index at page ii of the brief indicates that this missing portion of the brief embraces the subject matter included from subdivision (f) of Division I of the Argument, through subdivision (c) of Division III.

Not knowing whether we will have these missing pages prior to the time when this case is called, which

we understand will be on October 3, 1922, we note that so far as appears from the index the entire subject matter thereof has been answered in this brief, with the exception of the one point suggested in (f) above that "any other construction would be violative of the existing treaty with Japan."

It is obvious that the favored nation clauses of the last Japan-United States treaty of Commerce and Navigation, signed February 21, 1911, and all language therein with reference to reciprocal rights of the nationals of the two respective governments in the territories of the other have no reference whatsoever to rights of naturalization.

There are certain mutual rights with reference to commerce and navigation and also of course with reference to the protection of the persons and properties of the Japanese in the United States and of American citizens in Japan. There are, however, no guaranties contained in this treaty or in any other treaty negotiated between the United States and Japan giving any assurances with reference to right to citizenship. This is not a matter for treaty regulation. It is purely a matter for solution by the legislative bodies of the respective governments, each government to decide the question in its own way and at such times, irrespective of treaty agreements, as such of the governments may see fit.

V.

CONCLUSION.

Counsel refer to the necessity for continuing the long friendship between Japan and the United States. We respectfully submit that no nation can justly complain of the racial standard set by any other nation in the matter of qualification for citizenship. This is a subject peculiarly within the discretion and control of each nation to determine for itself. To limit rights of citizenship to those of the white race is in no way a reflection upon the intellectual or moral equipment of those of any other race. It is perfectly obvious that from the standpoint of education, intellectual powers, industry, and moral stamina the Japanese people are entitled to and have the unquestioned respect of the people of the United States. The same is true of other nations of the same or different race as the Japanese. This is not a question of comparing the attainments of these people with those of our own or any other people. It is a question of statesmanship and has been solved and settled for all time by the American people. They have determined, and the world knows of the determination, that they will not grant citizenship to those of the yellow, the brown or the red races. It may be as Dr. Monroe says that "The preservation of a conventional type is a matter of æsthetics. What

really counts in humanity is home influence and education and where the ideals are high the racial type is of little moment.”

With a clashing of races, however, competing with each other for their very existence as in the agricultural development of the Western States, the racial type is of supreme moment. The economic question must be answered. Wise statesmen have recognized this as a vital question which can not be ignored.

The world also knows the historical explanation for extending citizenship to those of the black race. If there be serious question as to the wisdom of our forefathers in granting this privilege to those of the black race, there is no question of their wisdom in refusing to grant it to those of the yellow or brown race. To say that the white, the yellow and the brown races can not assimilate is but to express a truism which is recognized by everybody with any knowledge on the subject at all.

It need not occasion surprise if a people, after having been blessed with a marvelous rebirth, and after having achieved a remarkable adaptation of American and European ideas and civilization, should be somewhat over-sensitive and greatly desire that they be not denied citizenship, either in America or in any European country. Yet the statesmen among those people know that it is far better to have the occasional resentment of the unthinking than to create a condition which must produce for all time

clash and conflict between dissimilar peoples of distinct races. Whether the privilege of naturalization will be extended to the Japanese is a question which the United States government must decide for itself. Whether the privilege of naturalization will be extended by the Empire of Japan to Americans is a question which the Empire of Japan must decide for itself. No well-informed American would fail to recognize the intolerable presumption of American insistence that the Empire of Japan extend to Americans the privilege of Japanese citizenship.

It is said in the brief on behalf of petitioner that "Japan looked upon America as her friend and type until she was rudely awakened by the attitude of the United States government during the Russo-Japanese war and events in California."

Neither of the half-expressed accusations of this paragraph finds any support in fact.

It would serve no useful purpose if the Japanese could now be erroneously convinced that the United States assumed any other than a proper relation to their government during that war. But the danger of being so convinced is not great, for the Japanese people will remember the friendly attitude toward them assumed by the then President of the United States and his splendid services in closing that conflict.

No exigency should cause counsel to make a reference to "events in California," from which unwarranted inferences could be drawn. If by this

reference there is intended a criticism of the action of California in adopting an alien land law, the reference is peculiarly unfortunate, as well as unwarranted.

It is true that California in 1913 adopted an alien land law and amended that act in 1920, and justification for the adoption of that law is found in the fact that ineligible aliens, including Japanese in large numbers, have taken up their abode and residence in this state. In fact it is stated by Professor Y. Takenob of Waseda University, Tokyo, that "more than one-half of the Japanese in North America are found in the State of California." This statement is published in the Japanese year book 1921-22, at page 36.

The alien land act of California, however, is drawn with the fullest regard for treaty rights. Indeed it has been repeatedly determined by the courts, both federal and state, that the alien land act of California does not conflict with the provisions of the treaty existing between the government of the United States and the Empire of Japan.

In their brief in the *Ozawa* case counsel ask, "Having given Japanese the bread of western civilization, shall the Japanese be forbidden to eat it?" The progress of the Japanese is as gratifying to the American people, including the people of the State of California, as to any people in the world. That progress in Japan and wherever the Japanese may lawfully be, can not result in anything other than the

betterment not only of themselves but of the human race. There are, however, certain fundamental facts in the history of every nation which can not be ignored by far-seeing statesmen. In an agricultural country such as our Western States there can not continue to exist the American farm home life as America has known it if that life is to be placed in competition with the Oriental farmer. One or the other must survive and the inevitable result would be the survival of the Oriental farmer when his method of intensive agricultural development is opposed to that of the American farmer. The American family reared along the lines of American traditions with the father managing the farm, the mother presiding in the home and the children during their younger years attending school, can not compete with the Oriental farm life wherein children and mother join with the father in the actual farm labor, and in addition do not enjoy conditions of life which are demanded by the American standard of living.

California recognizes what counsel for petitioners refer to as the "earth hunger" of the Japanese. We can not for a moment criticise these people for having this craving for expansion and desire to leave the shores of their own overcrowded land, and come to the hospitable lands and climate of our western states. That is human nature. But this fact does not make any less serious the inevitable conflict

which the people of the Western States in their wisdom are attempting to ward off by enacting legislation which accepts classifications already established over a long period of years by the federal government in the matter of citizenship. We have but declared, in strict conformity to all treaty and constitutional rights, that those whom Congress has said are ineligible to citizenship must not own interests in our agricultural lands.

We have studied the questions involved in these cases exhaustively in a sincere attempt to be of assistance to the court. We have studied the many decisions of our American courts and particularly of the Federal courts, and have also done research work in authorities on ethnology. We considered it our duty to make a most careful and painstaking examination of this entire subject.

It is, however, indeed gratifying to find that the conclusion reached as a result of this study is the very conclusion reached by our lawmakers as a matter of first impression and by ourselves at the threshold of our investigations. It is perfectly obvious that the average American man, woman or child if asked the question as to the race of the Japanese would without any hesitation answer that Japanese are yellow, brown, or possibly a mixture of those two races. Any one would be astounded on asking such a question to receive the answer that the Japanese are of the white race. They are popularly referred to over the world as the "little brown men" and such

popular appellation bespeaks an understanding of our American people and of the civilized world that the Japanese are not of the white race.

Respectfully submitted.

U. S. WEBB,
Attorney General of the
State of California;

FRANK ENGLISH,
Deputy Attorney General of the
State of California.

INDEX.

STATEMENT OF THE CASE	Page. 1-3
ARGUMENT	4-37
I. The act of June 29, 1906, 34 Stat. c. 3592, entitled "An act to establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States," is not complete in itself but is limited in its application to the eligible classes of persons mentioned in section 2169, R. S.....	4-29
(1) History of the naturalization laws.....	4-9
(2) The courts in construing these laws uniformly held that only "white persons" (aside from those of African descent) were eligible for naturalization....	9-13
(3) The act of 1906 did not extend the privilege of becoming citizens of the United States to any persons not theretofore eligible.....	13-30
(a) The purpose of the act.....	13-17
(b) Section 2169, R. S., not repealed.....	17-18
(c) Section 2169, R. S., specifically reaffirmed by act of May 9, 1918, 40 Stat. 542, c. 69.....	18-22
(d) Judicial interpretation since 1906.....	22-30
II. One of the Japanese race, born in Japan, is not a white person within the meaning of section 2169, R. S., and therefore may not be naturalized.....	30-37
CONCLUSION	38
APPENDIX	39-56

CASES CITED.

<i>Ah Yup, In re</i> , 5 Sawyer, 155.....	9, 10
<i>Alveto, In re</i> , 198 Fed. 688.....	22
<i>Bautista, In re</i> , 245 Fed. 765.....	22, 27
<i>Beasho v. United States</i> , 178 Fed. 245.....	22, 23
<i>Burton, In re</i> , 1 Alaska, 111.....	10, 13
<i>Camille, In re</i> , 6 Fed. 258.....	10, 13
<i>Dow, In re</i> , 226 Fed. 145.....	22, 23
<i>Easurk Emsen Charr, In re</i> , 273 Fed. 207.....	19, 22
<i>Gee Hop, In re</i> , 71 Fed. 274.....	9
<i>Halladjian, In re</i> , 174 Fed. 834.....	22, 27, 33
<i>Hong Yen Chang, In re</i> , 84 Cal. 163.....	9, 12
<i>Kanaka Nian, In re</i> , 21 Pac. (Utah) 993.....	10, 13
<i>Knight, In re</i> , 171 Fed. 299.....	22, 23
<i>Kumagai, Buntaro, In re</i> , 163 Fed. 922.....	22, 23
<i>Lampitoe, In re</i> , 232 Fed. 382.....	22, 27

II

	Page.
<i>Mohan Singh, In re</i> , 257 Fed. 209.....	22, 28
<i>Mozumdar, In re</i> , 207 Fed. 115.....	22, 29
<i>Po, In re</i> , 28 N. Y. Supp. 383.....	9, 13
<i>Sadar Bhagwab Singh, In re</i> , 246 Fed. 496.....	22, 28
<i>Saito, In re</i> , 62 Fed. 126.....	12
<i>United States v. Balsara</i> , 180 Fed. 694.....	22, 24
<i>United States v. Morena</i> , 245 U. S. 392.....	3
<i>Yamashita, Takuji, In re</i> , 30 Wash. 234.....	22
<i>Young, In re</i> , 198 Fed. 715.....	22, 26

OTHER AUTHORITIES.

Cong. Globe for 1869-70, pt. 6.....	7
Cong. Record, vol. 3.....	8, 9
Cong. Record, vol. 40, part 4, p. 3340.....	16
Encyc. Americana (1919), Title "Ethnology".....	36
Encyc. Britannica, Vol. II, p. 113.....	33
Encyc. Britannica, Vol. XV, p. 165.....	35
Nelson's Encyc., Vol. VI, p. 567.....	35
Rep. Comm. on Naturalization.....	14, 15

STATUTES CITED.

Act March 26, 1790, 1 Stat. 103.....	4
Act January 29, 1795, 1 Stat. 414.....	4
Act April 14, 1802, 2 Stat. 153.....	4
Act March 26, 1804, 2 Stat. 292.....	5
Act March 22, 1816, 3 Stat. 258.....	5
Act May 26, 1824, 4 Stat. 69.....	5
Act July 14, 1870, 16 Stat. 254.....	6
Act June 29, 1906, 34 Stat. 596.....	13-18
Act May 9, 1918, 40 Stat. 542.....	18
Revised Statutes, sec. 2169.....	6, 17, 18

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

TAKAO OZAWA	} No. 1.
v.	
THE UNITED STATES.	

*ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On October 16, 1914, Takao Ozawa filed his petition in the United States District Court for the Territory of Hawaii asking to be naturalized and made a citizen of the United States. The District Court denied the prayer of the petition.

The case was carried both by appeal and writ of error to the United States Circuit Court of Appeals for the Ninth Circuit (Ctf. 2).

That court on June 4, 1917, addressed a certificate to this court, which recited that the denial of the petitioner's prayer by the District Court was based on the ground that he was a person of the Japanese race born in Japan, and not eligible to citizenship under Revised Statutes, section 2169; that the other

qualifications were proved, including the statements in the petition, and are so conceded by the Government (Ctf. 1-3).

The Circuit Court of Appeals asks the instruction of this court concerning the following questions of law (Ctf. 2):

1. Is the act of June 29, 1906, 34 Stats. at Large, part 1, page 596, providing "for a uniform rule for the naturalization of aliens," complete in itself, or is it limited by section 2169 of the Revised Statutes of the United States?

2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?

3. If said act of June 29, 1906, is limited by said section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

These questions can be reduced to two:

First. Is section 2169 of the Revised Statutes still of force and to be read with the act of 1906 as defining to what aliens (other than the class mentioned in section 30) the provisions of the act of 1906 apply?

Second. Is a person of the Japanese race, born in Japan, eligible to naturalization under the limitations of said section 2169?

Since the questions in this case were certified this court has decided the case of *United States v. Morena*, 245 U. S. 392, in which it answered in the affirmative the following question certified by the Circuit Court of Appeals for the Third Circuit:

“Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of the act?”

It appears in the record that the petitioner herein declared his intention to become a citizen of the United States on the 1st day of August, 1902, and filed his petition for naturalization on October 16, 1914. His petition, therefore, was filed more than seven years after the date of the act of June 29, 1906. Apparently, therefore, under the authority of the *Morena* case, his petition must ultimately fail even though this court should sustain his contention with respect to the questions certified.

Under these circumstances it may be that this court will feel that the case is moot and therefore will be unwilling to pass upon the merits. However, the question involved is one of great importance, and the Government will be glad if the court should conclude to consider and decide it in order that the right of persons of the Japanese race with respect to naturalization may be settled.

There is another case upon the docket of this court, *Yamashita v. Hinkle*, secretary of state of the State of Washington, No. 177, which involves another

aspect of the same question, and in that case the Government will move for leave to file its brief in the case at bar as *amicus curiae*.

ARGUMENT.

I.

THE ACT OF JUNE 29, 1906, 34 STATUTES AT LARGE, C. 3592, ENTITLED "AN ACT TO ESTABLISH A BUREAU OF IMMIGRATION AND NATURALIZATION AND TO PROVIDE FOR A UNIFORM RULE FOR THE NATURALIZATION OF ALIENS THROUGHOUT THE UNITED STATES," IS NOT COMPLETE IN ITSELF BUT IS LIMITED IN ITS APPLICATION TO THE ELIGIBLE CLASSES OF PERSONS MENTIONED IN SECTION 2169 OF THE REVISED STATUTES.

(1) History of the naturalization laws.

The first law on this subject was passed in 1790, 1 Stat. 103, c. 3. Section 1 of that act provided:

That any alien, *being a free white person*, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record. * * *
(Repealed by act of Jan. 29, 1795, c. 20.)

The subsequent acts relating to the question at issue and their provisions have been:

The act of January 29, 1795, 1 Stat. 414, c. 20, sec. 1:

That any alien, *being a free white person*, may be admitted to become a citizen of the United States, or any of them. * * *
(Repealed by act of Apr. 14, 1802, c. 28.)

The act of April 14, 1802, 2 Stat. 153, c. 28, sec. 1:

That any alien, *being a free white person*, may be admitted to become a citizen of the United States, or any of them. * * *

The act of March 26, 1804, 2 Stat. 292, c. 47, sec. 1:

That any alien, *being a free white person*, who was residing within the limits and under the jurisdiction of the United States, at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act entitled "An Act to establish an uniform rule of naturalization." * * *

The act of March 22, 1816, 3 Stat. 258, 259, c. 32, sec. 2:

That nothing herein contained shall be construed to exclude from admission to citizenship, *any free white person* who was residing within the limits and under the jurisdiction of the United States between [period just above mentioned, June 18, 1798, and April 14, 1802]
* * *

The act of May 26, 1824, 4 Stat. 69, c. 186, secs. 1, 4:

That any alien, *being a free white person and a minor*, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arrival at the age of twenty-one years * * * may * * * be admitted a citizen of the United States * * *.

SEC. 4. That a declaration by any alien, *being a free white person*, of his intended appli-

cation to be admitted a citizen of the United States * * * shall be a sufficient compliance with said condition * * *. [Italics in foregoing statutes are ours.]

The act of July 14, 1870, 16 Stat. 254, 256, c. 254, sec. 7:

That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.

It is clear that a provision declaring the character of persons eligible to naturalization, and thus limiting the aliens so eligible, has been a part of every naturalization law, and until 1870 the limitation was to *free white persons*.

Title XXX of the Revised Statutes, sections 2165 to 2174, inclusive, provides for naturalization of aliens. Section 2165 prescribes the procedure. Section 2166 provides for naturalization of aliens who have served as United States soldiers and have been honorably discharged. Section 2169 declares what aliens may be naturalized under Title XXX, as follows:

The provisions of this title shall apply to aliens [*being free white persons*, and to aliens] of African nativity and to persons of African descent. [Italics ours.]

In the first edition of the Revised Statutes of 1873 the words in brackets "*being free white persons, and to aliens*" were by an error of compilation omitted. This was corrected by the act of February 18, 1875, 18 Stat. 316, 318, c. 80. A deliberate declaration by

Congress of its will to maintain the limitation expressed by the words "white persons"; and this limitation is still the law unless it has been by implication repealed by the act of 1906 now under consideration.

When the act of July 14, 1870, 16 Stat. 254, was under discussion an amendment was offered by Charles Sumner to strike out the word "white," but the amendment was rejected through the efforts of the Western Senators, who objected that it would authorize the naturalization of Asiatics. Cong. Globe for 1869-70, part 6, pp. 5121-5125, 5163, 5176-5177. While Japan was but once mentioned, and then only casually (p. 5164), the word "Asiatics" was used repeatedly, and it is clear that the debaters understood that by use of the word "white" Japanese were excluded.

This impression is strengthened by the debate in 1875, concerning the reinsertion into the law of the words "free white persons," after their inadvertent omission from the first edition of the Revised Statutes. The Committee on the Revision of the Laws had submitted a bill to correct numerous similar omissions. Mr. Willard moved that the law be permitted to stand as printed, saying:

It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word "white" stricken out, is not a wise statute. I understand that Members from Cali-

fornia and the Pacific coast make objection to the naturalization of *Asiatics*, more especially the *Chinese*. (3 Cong. Rec. 1081.)

Mr. Page immediately replied:

I hope the amendment of the gentleman from Vermont (Mr. Willard) will not prevail.
* * * When this question was discussed in the Senate some three or four years ago, upon a motion of Mr. Sumner to strike out the word "white" from the naturalization laws, the Pacific coast Senators at that time prevailed upon him to consent to amend the naturalization laws so as to include persons of African descent, *which would exclude Asiatics*.

Upon a ruling by the Speaker that amendments were out of order, the bill being merely to correct errors, and not to initiate new legislation, Mr. Willard's motion was withdrawn.

A somewhat similar colloquy took place in the Senate, where Mr. Sargent said:

We have the guaranty of the committees that the provisions of this bill simply restore the law as Congress intended it should be at the time they passed the Revised Statutes. Let that be done and it is fair. Less than that is unfair. When that is done, if the Senator desires to bring forward a bill which shall *enable Asiatics* to be naturalized, I shall be prepared to debate that question with him. (3 Cong. Rec. 1237.)

Similarly, Mr. Ferry said:

Mr. President, it is obvious, after what has fallen from the lips of the Senator from Cali-

fornia and the Senator from New York, that the real question after all can not be taken upon the amendment that I have proposed. That question would be whether the Senate would deliberately exclude from the operation of the naturalization laws *all Asiatics*, a third of the human race or more * * * I withdraw the amendment. (3 Cong. Rec. 1238.)

- (2) The courts, in construing these laws, uniformly held that only "white persons" (aside from those of African descent) were eligible for naturalization.

The uniform judicial construction of the words "white persons" in these acts has been to limit naturalization to people belonging to what is ordinarily and in common speech known as the white or Caucasian race; and there is no reported case in which naturalization under them was granted to any person belonging to any of the races commonly called the brown, yellow, Mongolian, Malay, or Asiatic races. The following cases were decided prior to the passage of the act of 1906:

In re Ah Yup, 5 Sawyer, 155; Fed. Cas. 104:

Chinese, Circuit Court, District of California, 1878.

In re Hong Yen Chang, 84 Cal. 163.

Chinese, 1890.

In re Gee Hop, 71 Fed. 274:

Chinese, Northern District of California, 1895.

In re Po, 28 N. Y. Supp. 383:

Burmese, City Court of Albany, 1894.

In re Kanaka Nian, 21 Pac. 993:

Hawaiian; Supreme Court of Utah, 1889.

In re Camille, 6 Fed. 257:

Indian, Circuit Court, District of Oregon, 1880.

In re Burton, 1 Alaska, 111:

Indian, 1900.

In re Saito, 62 Fed. 126:

Japanese, Circuit Court, District of Massachusetts, 1894.

In re Ah Yup, 5 Sawyer, 155 was a petition by a Chinese for naturalization. In denying the petition the court said:

Words in a statute, other than technical terms, should be taken in their ordinary sense. The words "white person," as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words "white person" would intend a person of the Caucasian race.

In speaking of the various classifications of races, Webster in his dictionary says: "The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, *Japan*, etc.; 3. The Ethiopian or negro (black) race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or brown race, occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair, and skull. Linnaeus makes four divisions, founded on the color of the skin: "1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and, 4. African, black." Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics include the Mongolian in the white or whitish race. (See *New American Cyclopedia*, title "Ethnology.")

Neither in popular language, in literature, nor in scientific nomenclature do we ordinarily, if ever, find the words "white person" used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a

word of description, is made an important factor in the basis adopted for the distinction and classification of races. * * *

Other cases refusing naturalization to Chinese were, *In re Hong Yen Chang*, 84 Cal. 163, and *In re Gee Hop*, 71 Fed. 274.

In re Saito, 62 Fed. 126, was a petition by a Japanese for naturalization. In denying the petition the court said (p. 126):

This is an application by a native of Japan for naturalization.

The act relating to naturalization declares that "the provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Rev. St. sec. 2169. The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term "white persons."

This opinion then gives a history of the legislation resulting in the correction of Revised Statutes, section 2169, which has been hereinbefore recited.

The history of legislation on this subject shows that Congress refused to eliminate "white" from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races. (P. 127.)

By the same reasoning it was held that a Burmese was not entitled to naturalization:

In re Po, 28 N. Y. Supp. 383,

nor a Hawaiian of the Malay race:

In re Kanaka Nian, 21 Pac. 993,

nor an Indian:

In re Camille, 6 Fed. 256,

In re Burton, 1 Alaska, 111.

At the time of the passage of the act of 1906, therefore, through a uniform course of judicial construction of statutory language, continued in the law for over a century, it had become settled that Japanese and all other people not of the white or Caucasian race were not eligible for naturalization as "white persons."

8) The act of 1906 did not extend the privilege of naturalization to any persons not theretofore eligible.

(a) *The purpose of the act.*

The purpose of the act of 1906 was to stop the flagrant abuses and frauds which had become scandalous, by providing safeguards and a strict and uniform procedure. The act was the result of the labors of a commission appointed by an executive order of President Roosevelt issued March 1, 1905.

The commission consisted of one officer each from the Departments of State, Justice, and Commerce and Labor. Their report was transmitted to Congress by the President on December 5, 1905 (H. Doc. No. 44, 59th Cong., 1st sess.), and its recommendations formed the basis of the bill which became the act under consideration.

In its report the commission quoted from the report of the Attorney General for 1903 the following language contained in a report of Mr. Van Deuzen, special examiner of the Department of Justice:

The evidence is overwhelming that the general administration of the naturalization laws has been contemptuous, perfunctory, indifferent, lax, and unintelligent, and in many cases, especially in inferior State courts, corrupt.

The chief motive which led to fraudulent naturalization was the desire to vote, which caused corrupt politicians to encourage perjury and commit bribery, under the guise of paying the naturalization fees, especially just before election. Another motive was found in the labor laws and the rules of some labor unions which prevented the employment of aliens in certain classes of work. Another motive was the desire of aliens to go abroad under the protection of the United States. There was no uniformity in the actual admission of aliens to citizenship by reason of the fact that they were admitted by many different courts, State and Federal, with no uniform procedure, many of them of inferior jurisdiction and presided

over by inferior judges, and, in practice, the entire proceedings were often turned over to the clerk of the court. It was to correct these abuses that the act of 1906 was framed.

After referring to previous legislation and to the fact that the act of 1802 was still in force, the report says of that act:

The principles laid down in that act are, in the commission's opinion, sound and should not be changed * * *.

Accepting the principles laid down in the old law, the commission makes the recommendations contained in this report *with a view to preventing violations of the law*; but it also recommends that the following additional principles be incorporated into the law:

First. That no one be admitted to citizenship who does not intend to reside permanently in the United States. This recommendation is discussed in another part of this report.

Second. That no one be admitted to citizenship who does not know the English language. [*Italics ours.*]

The bill afterwards reported in the House by the Committee on Immigration and Naturalization followed the recommendation of the commission. Mr. Bonyne, in presenting the bill to the House, referred to the fact that the laws respecting naturalization were practically the same as they had been written by James Madison in 1795. He then said:

The bill which we present to-day does not change the fundamental law in reference to naturalization, except in two particulars, to

which I will address myself a little later; but it does provide for a general and uniform system of naturalization to be enforced throughout the United States. Cong. Record, volume 40, part 4, page 3640.

The two changes in the fundamental law, he afterwards explained, were (1) requiring the applicant to be able to write either in his own language or the English language and to be able to read, speak, and understand English; and (2) he must intend to reside permanently in the United States. In the course of his remarks Mr. Bonyng referred to the great amount of fraud which had grown up under the old law and to the appointment of a special prosecuting attorney who in two years had secured 685 convictions and the cancellation of 1,916 fraudulent certificates.

The act does not purport to declare who are entitled to be naturalized. Sections 1 and 2 create and provide for the Bureau of Immigration and Naturalization and the procedure by which naturalization can be effected. Section 27 prescribes the forms to be used. Section 15 provides for the cancellation of certificates of naturalization fraudulently or illegally procured. Sections 16 to 25 create certain crimes in connection with the subject of naturalization and provide for their punishment. Section 26 prescribes what laws are repealed by this act. Section 28 empowers the Secretary of Commerce and Labor to make rules and regulations and declares that certified copies of all papers, etc., provided for by the act are admissible in evidence instead of

originals. Section 29 makes an appropriation to carry the act into effect. Section 30 provides for naturalizing all persons not citizens who owe permanent allegiance to the United States. Section 31 declares when the act shall take effect. This completes the act.

The aliens, citizens, or subjects of other countries, eligible to naturalization under the laws of the United States can not be discovered from the act of 1906.

(b) *Section 2169, R. S., not repealed.*

Section 26 of the act of 1906 expressly repeals sections 2165, 2167, 2168, and 2173 of the Revised Statutes and section 39 of the act of March 3, 1903, 32 Stat. 1213, 1222, c. 1012. The subject matter of these repealed acts is covered by parts of the act of 1906. The remaining sections of Title XXX not so repealed are sections 2166, which makes special provision for honorably discharged soldiers; 2170, which makes five years' residence necessary; 2171, which forbids the admission of enemy aliens; 2172, which provides for the children of naturalized persons; 2174, which makes special provision for seamen; and 2169, the section under consideration and which remained the only provision on the statute books defining those entitled to be naturalized. It is inconceivable that section 2169 would not have been named as repealed unless it was purposely left as a part of the law retained. *In re Alverto*, 198 Fed. 688, 690.

To hold otherwise, in view of the long line of judicial decisions with which Congress was of course familiar, would mean to decide that the settled policy of the Nation for more than a century with respect to a matter of the most vital concern is, by mere implication, to be deemed changed in a most radical manner.

(c) *Section 2169, R. S., was specifically reaffirmed by the act of May 9, 1918, 40 Stat. 542, c. 69.*

After this case was certified to this court, Congress passed the act of May 9, 1918. This act added seven new subdivisions to section 4 of the act of 1906, making special provision for the naturalization of Filipinos, Porto Ricans, and aliens who served in the naval and military forces of the United States. It also contained provisions regarding enemy aliens, and repealed certain sections of the Revised Statutes, including sections 2166, 2171, and 2174, and further provided:

That all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; *but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined.* [Italics ours.]

This is a clear recognition and declaration that it had not been repealed, and an expression of the legislative intention to keep it in force, except as expressly therein modified.

In the brief submitted on behalf of the petitioner herein an attempt is made to repel the clear inference to be drawn from this saving clause in the repealing section by an elaborate argument which reaches the conclusion that, though section 2169 is retained in the law, "it no longer has any application." Petitioner's brief, pp. 33-36. It is stated that "the first of these subdivisions numbered 'seventh' is a curiosity chiefly because of the anomalous allegiance of the Filipino and Porto Rican" (p. 33), and that "there is no seventh subdivision of *this* act unless it be entitled 'thirteenth'" (p. 36). There is, nevertheless, a subdivision designated "seventh," and its provisions and their relation to section 2169 are perfectly clear when they are examined for the purpose of finding that they have a meaning, rather than for the purpose of finding that they have not. Their effect is to authorize naturalization of Filipinos and Porto Ricans who served in the military forces of the United States, and permitting naturalization of all aliens who had so served without complying with many formalities required of others, but did not enlarge the *right* to naturalization, except in the cases of Filipinos and Porto Ricans.

In re Easurk Emsen Charr, 273 Fed. 207,
District Court, Western District of Missouri,
April, 1921.

That case was a petition for naturalization by a native of Korea, a subject to the Mikado of Japan, who was drafted, served in the Army of the United

States, and honorably discharged. His educational qualifications, character, and military record were good. His petition was opposed and denied upon the sole ground that members of his race were barred under section 2169 of the Revised Statutes, as the act of 1918 did not enlarge the limitation imposed by that section except as to Filipinos and Porto Ricans. The application was naturally one which would appeal strongly to the court, and Judge Van Valkenburgh gave it most painstaking care, even to the extent of a rehearing. His opinion covers the whole field of the naturalization laws logically and concisely.

The court says of the act of 1918 (pp. 210-212):

The purpose of this act is well understood. It was to reward those aliens who had entered the military or naval service of the United States, as therein described, by admitting them to citizenship without many of the slow processes, formalities, and strictness of proofs which were rigidly provided and enforced under the law affecting naturalization as it existed then, and as it exists now. The amendments made were not to the title as a whole, but primarily to section 4 of the act of June 29, 1906, 34 Stat. 596. This section deals, not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. * * *

Incidentally it has been urged that section 2169 was repealed, by implication, by the act of June 29, 1906 (34 Stat. 596). The conten-

tion has uniformly been rejected, and, notably, in cases involving Filipinos. *In re Alverto* (D. C.), 198 Fed. 688; *In re Rallos* (D. C.), 241 Fed. 686; *In re Lampitoe* (D.C.) 232 Fed. 382; *United States v. Balsara*, 180 Fed. 694, 103 C. C. A. 660.

If, as contended by the petitioner, the exception reserved was intended to mean *any alien* who should perform military service, it is difficult to perceive why the provision as to the continuing force of section 2169 was necessary at all; the limitation of military or naval service being sufficient to preserve that section intact in all its general features. This view is corroborated and emphasized by the fact that, throughout the original title 30, Revised Statutes of 1878, the term "any alien" is used repeatedly without qualification, the limitation to free white persons and those of African nativity and descent being raised entirely from section 2169; and the same is true of section 2166 and other acts conferring special privileges upon soldiers and sailors. Moreover, as has been previously stated, the act of May 9, 1918, was chiefly intended to modify section 4 of the act of 1906 as to procedure merely, shortening the time and smoothing the way to citizenship. Section 2169 has to do only with racial qualification, and out of abundance of caution it was expressly reaffirmed.

On petition for rehearing, the court reaffirmed its decision and quoted from the report of the Sen-

ate Commission on Immigration upon the act of 1918, which contained this significant language (p. 214):

It (section 2 of the act) also declares that nothing in the act shall enlarge or repeal in any way section 2169 of the Revised Statutes, except as specified in the seventh subdivision and under the limitation therein defined. This means that Filipinos may be naturalized who are enlisted in the army or navy of the United States and are honorably discharged therefrom.

(d) *Judicial interpretation since 1906.*

Since the passage of the act of 1906 the courts without exception have continued to hold that section 2169, R. S., was still in force, its limitation still binding.

In re Alverto, 198 Fed. 688.

In re Kumagai, 163 Fed. 922.

In re Knight, 171 Fed. 299.

In re Young, 198 Fed. 715.

Bessho v. U. S., 178 Fed. 245.

U. S. v. Balsara, 180 Fed. 694.

In re Yamishito, 30 Wash. 234.

In re Dow, 226 Fed. 145.

In re Easurk Emsen Charr, 273 Fed. 207.

In re Halladjian, 174 Fed. 834.

In re Bautista, 245 Fed. 765.

In re Mohan Singh, 257 Fed. 209.

In re Sadar Bhagwab Singh, 246 Fed. 496.

In re Lampitoe, 232 Fed. 382.

In re Mozundar, 207 Fed. 115.

In re Kumagai (1908), 163 Fed. 922, was an application by an "educated Japanese gentleman" (p. 923), honorably discharged from the Regular Army, for naturalization. The District Court for the Western District of Washington, in denying the application, held that section 2166, R. S., authorizing the naturalization of aliens honorably discharged from the military service of the United States, did not, in view of section 2169, R. S., permit the naturalization of a Japanese who had served as a soldier in the United States Army, and said (p. 924):

* * * The use of the words "white persons" clearly indicates the intention of Congress to maintain a line of demarcation between races and to extend the privilege of naturalization only to those of that race which is predominant in this country. (Citing the *Ah Yup*, *Saito*, and *Yamashita* cases.)

In re Knight, 171 Fed. 299, was an application by one whose father was English and whose mother was half Japanese and half Chinese. He had been honorably discharged from the United States Navy and had a medal for service in the Battle of Manila. The District Court, Eastern District of New York (1909), denied the application following the *Kumagai* case.

Bessho v. United States (1910), 178 Fed. 245, was an appeal from the District Court for the Eastern District of Virginia to the Circuit Court of Appeals, Fourth Circuit. The applicant was a Japanese who had been honorably discharged from the United

States Navy. The District Court denied the application and its decision was affirmed by the Court of Appeals, holding, after a review of the naturalization laws, that section 2169 of the Revised Statutes remained unrepealed by the act of 1906 and limited the privilege of naturalization to white persons and persons of African nativity or descent. "The intention was to exclude from naturalization all aliens except those of the Caucasian and African races."

United States v. Balsara, 180 Fed. 694 (Circuit Court of Appeals, Second Circuit, 1910), was an appeal from an order admitting to citizenship a Parsee. The Court of Appeals affirmed the order holding that the Parsees were white persons within the meaning of section 2169 of the Revised Statutes. The right of the applicant to be naturalized was strongly opposed by the Government and, as the court says, complete and interesting briefs were furnished. The contention of the Government was that Congress, by the words "White persons," intended to include Europeans only, while counsel for Balsara insisted that the intention was to confer the privilege of naturalization upon members of the white or Caucasian race only. The court said (pp. 695-697):

This we think the right conclusion and the one supported by the great weight of authority. *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Saito* (C. C.) 62 Fed. 126; *In re Camille* (C. C.) 6 Fed. 256; *Matter of San C. Po.*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; *In re Buntaro Kumagai* (D. C.) 163 Fed. 922; *In*

re Knight (D. C.) 171 Fed. 297; *In re Najour* (C. C.) 174 Fed. 735; *In re Halladjian* (C. C.) 174 Fed. 834. Doubtless Congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term "Caucasian race" mentioned in some of the foregoing decisions. They probably had principally in mind the exclusion of Africans, whether slave or free, and Indians, both of which races were and had been objects of serious public consideration. The adjective "free" need not have been used, because the words "white persons" alone would have excluded Africans, whether slave or free, and Indians. Still effect must be given to the words "white persons." The Congressmen certainly knew that there were white, yellow, black, red, and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we can not believe he would have been excluded on the ground that he was not a white person, and, if a Parsee had applied, the court would have had to determine then, just as the Circuit Court did in this case, whether the words used in the act did or did not cover him.

We think that the words refer to the race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. * * *

Counsel for certain Syrian interveners as *amici curiae* contend that the words "free white persons" were used simply to exclude

slaves and free negroes. If so, of course, all other aliens were included. This is enforced by the further argument that the act of June 29, 1906 (act June 29, 1906, c. 3592, 34 Stat. 596; U. S. Comp. St. Supp. 1909, p. 97), repealed section 2169, Rev. St. U. S., by necessary implication, and that all aliens except those expressly excluded, like the Chinese, are now eligible to citizenship. * * * It seems to us incredible that Congress could have intended to make such a departure from existing law by implication merely.

In re Young, 198 Fed. 715, District Court, Western District of Washington, 1912, was an application by a man whose father was German and whose mother was Japanese. The application was denied. The court said (p. 716):

The term "white person" must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as "fair whites" or "dark whites," as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

It is just as certain that, whether we consider the Japanese as of the Mongolian race or the Malay race, they are not included in what are commonly understood as "white persons." In the abstractions of higher mathematics, it

may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it can not be said that one who is half white and half brown or yellow is a white person, as commonly understood.

In re Bautista, 245 Fed. 765, District Court, Northern District of California, 1917, was a petition for naturalization by a Filipino, born in the Philippine Islands while they were under Spanish rule, who was serving his third term of enlistment in the United States Navy and who had resided continuously in the United States for more than eight years, and the court held that he was entitled to be naturalized under section 30 of the act of 1906, as a person who owed permanent allegiance to the United States. The court held that while section 2169 of the Revised Statutes had not been repealed, the distinction of color therein contained must yield to section 30 of the act of 1906.

In re Lampitoe, 232 Fed. 382, District Court, Southern District of New York, 1916, was a petition for naturalization by one whose mother was a Filipino and whose father was half Filipino and half Spanish. The application was denied solely on the ground of his race, the court saying (p. 382):

Where the Malay blood predominates it would be a perversion of language to say that the descendent is a "white person."

In re Halladjian, 174 Fed. 834, Circuit Court, District of Massachusetts, 1909, was an application by

four Armenians for naturalization, which was granted. In granting the applications Judge Lowell wrote a long, learned, and most interesting opinion, in which he departed somewhat from the views which had been expressed by other judges. He was disposed to hold that the words "white persons" were used to designate persons not otherwise classified as a sort of "catchall" to include everybody except Negroes and Indians. He held that there was no European or white race and no Asiatic or yellow race, and that the mixture of races in Western Asia for 25 centuries raises a doubt if its individual inhabitants can be classified by race, but if the ordinary classification is followed, Armenians have always been reckoned as Caucasians and white persons and that the applicants were white persons in appearance, not darker in complexion than some persons of northern European descent, and he also finds that the use of the word "white" as a "catch-all" according to his idea has been narrowed so as to exclude Chinese and Japanese.

In re Sabar Bhagwab Singh, 246 Fed. 496, District Court, Eastern District of Pennsylvania, 1917, was an application for naturalization by a Hindu and the application was denied. A long and interesting opinion was written by Judge Dickinson, his conclusion being that the Hindu was not a white person within the meaning of the Statutes.

In re Mohan Singh, 257 Fed. 209, District Court, Southern District of California, 1919, was another

application for naturalization by a Hindu and the application was granted in this case. The court also wrote a long and interesting opinion in which it was unable to agree with Judge Dickinson in the *Sabar Bhagwab Singh* case, 246 Fed. 496. In the course of the opinion the court said (pp. 211, 212):

In spite of the discussions and not infrequent controversies in the courts, which have arisen with respect to the meaning of the phrase, Congress has seen fit at no time since its incorporation into the law to change it, and it remains to-day as it was originally enacted more than a century and a quarter ago. * * * The possession of a "common racial stamp" is the basis of classification.

My conclusion is that, in the absence of any more definite expression by Congress, which is the body possessing the power to determine who may lawfully apply for naturalization, any members of the white or Caucasian race, possessing the proper qualifications in every other respect, are entitled to admission under the general wording of the statute respecting "all free white persons."

In re Mozumdar, 207 Fed. 115, District Court, Eastern District of Washington, 1913, was an application for naturalization by a Hindu. The court held him to be a white person and granted the application.

II.

ONE OF THE JAPANESE RACE, BORN IN JAPAN, IS NOT A WHITE PERSON WITHIN THE MEANING OF SECTION 2169 OF THE REVISED STATUTES, AND, THEREFORE, MAY NOT BE NATURALIZED.

Unless, then, all the mass of judicial interpretation of Congressional action which has been on the Statute books for years, of which Congress must have had knowledge, is wholly wrong, or unless Congress has silently acquiesced in what, if wrong, has amounted to continuous and wholesale defiance of the Congressional will, a Japanese may not be naturalized unless he is a white person. So the ultimate question is, is the Japanese a white person, and it presents itself as a question of statutory construction. In the first place it is said that we must give to these words the meaning which they had in the minds of the legislators of 1790, which is probably true; and that they were then used as a sort of "catchall" and meant all men except Negroes and Indians, which is surely untrue. It is undoubtedly true that the men of 1790 used the words as they understood them, and that their purview of possible and probable immigration comprised only Negroes and white men. But there is no warrant for believing that in their minds the whole human race consisted of black men, red men, and white men. To do so is to deny them the intelligence which they surely possessed. But on the other hand, to argue that they cast their eyes over the earth and considered the races thereof, and then, with delibera-

tion, chose to exclude Chinese, Japanese, and the other yellow and brown peoples, is to give them credit for an imagination which they did not have. To ascertain their intent, it is not necessary to entangle one's common sense in a web of theory. The men who settled this country were white men from Europe and the men who fought the Revolutionary War, framed the Constitution and established the Government, were white men from Europe and their descendants. They were eager for more of their kind to come, and it was to men of their own kind that they held out the opportunity for citizenship in the new nation. It is quite probable that no member of the first Congress had ever seen a Chinese, Japanese or Malay, or knew much about them beyond the fact that they were people living in remote and almost inaccessible parts of the world having manners, customs and language which seemed strange, and unwilling to mingle with western people. Chinese immigration to this country did not begin until after the discovery of gold in California, and the census of 1870 was the first to report Japanese, 55 in number.

It is a matter of common knowledge that for many years Japan, and to a somewhat less degree, China, maintained a policy of isolation, and this policy continued from the middle of the seventeenth century until the Perry Expedition in 1853. American thought and statesmanship were directed toward Europe, not toward Asia. It was "Europe" and

its "set of primary interests" with which Washington was concerned in his farewell address, and it was against interweaving our destiny with that of any part of "Europe," or entangling our peace and prosperity in the toils of "European" ambitions that he warned his countrymen. It was European trade that was sought and, beyond doubt, European immigration which was desired and expected.

The possibility of Chinese or Japanese Immigration probably never was considered. And that is the good and sufficient reason for holding that the words "white persons" as then used were not a "catchall" for all people not black or red. The fathers offered citizenship to men of the kind they knew and hoped and expected would come, not to those they did not know and did not expect to come. Citizenship has always been deemed a choice possession, and it is not to be presumed that our fathers regarded it lightly, to be conferred promiscuously according to a "catchall" classification. It could only be obtained by those to whom it was given, and the men of 1790 gave it only to those whom they knew and regarded as worthy to share it with them, men of their own type, white men. This does not imply the drawing of any narrow or bigoted racial lines, but a broad classification inclusive of all commonly called white and exclusive of all not commonly so called. This has been the rule followed by the courts, and the cases already cited, many of which show exhaustive research and wealth of learning, leave very little to be said. A reading of the opinions of the judges who

have written in these cases reveals impressive unanimity in one respect. Each person admitted, with the single exception of the Filipino (*In re Bautista*, *supra*, a special case), was admitted because he was deemed as matter of fact to be white; each person refused was refused because he was deemed as matter of fact not to be white. The ethnological discussions have covered a wide range of most interesting subjects, particularly in the border-line cases, the *Syrian case* (*In re Dow*, 226 Fed. 145), and the *Armenian case* (*In re Halladjian*, 174 Fed. 834). But the present case can not be regarded as a doubtful case. The Japanese is not, and never has been, regarded as white or of the race of white people.

While the views of ethnologists have changed in details from time to time, it is safe to say that the classification of the Japanese as members of the yellow race is practically the unanimous view. Unless it could be demonstrated that the Japanese were of the white race, ethnological differences would be unimportant, even if otherwise relevant.

The history of the several views as to the divisions of mankind is given in the *Encyclopædia Britannica* (11th ed., Vol. II, p. 113—Anthropology), as follows:

Classifications of man have been numerous, and though, regarded as systems, most of them are unsatisfactory, yet they have been of great value in systematizing knowledge, and are all more or less based on indisputable distinctions. J. F. Blumenbach's division, though published as long ago as 1781, has

had the greatest influence. He reckons five races, viz, Caucasian, Mongolian, Ethiopian, American, Malay. * * * The yet simpler classification by Cuvier into Caucasian, Mongol and Negro corresponds in some measure with a division by mere complexion into white, yellow, and black races; but neither this three-fold division nor the ancient classification into Semitic, Hamitic, and Japhetic nations can be regarded as separating the human types either justly or sufficiently. * * * On the whole, Huxley's division probably approaches more nearly than any other to such a tentative classification as may be accepted in definition of the principal varieties of mankind, regarded from a zoological point of view, though anthropologists may be disposed to erect into separate races several of his widely-differing subraces. He distinguishes four principal types of mankind, the Australioid, Negroid, Mongoloid, and Xanthochroic ("fair whites"), adding a fifth variety, the Melanochroic ("dark whites").

The article on Ethnology in this same authority divides the peoples as follows:

- (a) Caucasian or white race. * * *
- (b) Mongolic or yellow man. * * *

Of the typical Mongolic races, the chief are the Chinese, Tibetans, Burmese, Siamese * * * the pure Turkic peoples and the Japanese and Koreans. Less typical, but with the Mongolic elements so predominant as to warrant inclusion, are the Malay peoples of the Eastern Archipelago. * * *

(c) Negroid or black man.

Encyc. Britannica, 11th ed., vol. IX, p. 851.

Very recent authorities say:

The modern Japanese are a very mixed people. The largest factor in the production of the Japanese is to be traced back to the Mongolian race of the adjacent continent. X New Int. Encyc. (Japan), p. 335.

Language and anthropology show that the predominant element in the Japanese race is Mongol. VI Nelson's Encyc. (Japan), p. 567.

The article on Japan in volume 15 of the Encyclopedia Britannica, 11th edition, 1911, is written by Baron Kakuchi, President of the Imperial University of Kyoto, and the following information is from that article:

Speaking of the physical characteristics of the Japanese, he says that "The Japanese, the Koreans, and the Chinese resemble each other so closely that, under similar conditions as to costumes and coiffure, no appreciable difference is apparent." He speaks of an "exhaustive anthropological study of the Japanese" made by Dr. E. Baelz, emeritus professor of medicine in the Imperial University of Tokyo, who enumerates the following subdivisions of the race inhabiting the Japanese Islands: "The first and most important is the Manchu-Korean type; that is to say the type which prevails in North China and in Korea * * *. The second type is the Mongol. It is not very frequently found in Japan, perhaps because, under favorable social conditions, it tends to pass into the Manchu-Korean type. * * *

More important than either of these types, as an element of the Japanese Nation, is the Malay. * * * None of the above three, however, can be regarded as the earliest settlers in Japan. Before them all was a tribe of immigrants who appear to have crossed from northeastern Asia at an epoch when the sea had not yet dug broad channels between the continent and the adjacent islands. These people—the Ainu—are usually spoken of as the aborigines of Japan. * * * They once occupied the whole country, but were gradually driven northward by the Manchu-Koreans and the Malays until only a mere handful of them survived in the northern island of Yezo. * * * Amalgamation has been completely effected in the course of long centuries, and even the Ainu, though the small surviving remnant of them now live apart, have left a trace upon their conquerors." P. 165.

The *Encyclopædia Americana*, 1919, title, "Ethnology," says:

After successive efforts by able students to classify mankind upon this or that character or group of characters, the tendency now seems to be to return to the earlier classification. To recur to the three greater subdivisions—white, black, and yellow; or Caucasian, Negro, Mongolian.

With all the data gathered and the characters used in succeeding classification, the original color plan in a general way is as good as we know. Popularly, too, this seems to have

struck the fancy. Without thought we speak of a person as white, black, or red, as he is a Caucasian, Negro, or American Indian.

The article classifies the Japanese with the Koreans, as a group of the Sibiric branch of the Asiatic or Mongolian race whose characteristic color is yellow or olive.

It is not important to the present purpose to settle accurately all these interesting questions. It is enough that there remains undisturbed the legal and popular conception that the Japanese are not white persons within the meaning of the naturalization laws.

A claim has been made that the aboriginal people of the Japanese Islands called Ainus were of the white or Caucasian stock. Even if this be true, and it is at most mere conjecture, they have been driven out by the Manchu-Koreans and Malays until, as Baron Kakuchi says, *supra*, "only a mere handful" survived; and while even they "have left a trace upon their conquerors," it can not be said that the Japanese people are, therefore, white any more than it can be said that the trace of Indian influence has made the American people red. Furthermore, there is nothing in the case to show that the petitioner is an Ainu.

The decision of the district judge in this case is a valuable contribution to the solution of the questions presented by this certificate and is printed as an appendix to this brief. It seems unnecessary to repeat the discussions there set forth.

CONCLUSION.

It is therefore respectfully submitted:

That the first question certified should be answered that the act of June 29, 1906 (34 Stats. at Large, part 1, page 596), is limited by section 2169 of the Revised Statutes of the United States.

That the second question should be answered in the negative.

As to the third question, it is respectfully suggested that under the facts stated in the certificate, it is embraced in questions one and two, and that as applied to the facts of this record, the third question should be answered in the negative.

JAMES M. BECK,

Solicitor General.

ALFRED A. WHEAT,

Special Assistant to the Attorney General.

SEPTEMBER, 1922.

APPENDIX.

DECISION.

[In the United States District Court, Territory of Hawaii. April, A. D. 1916, term. No. 274. In the matter of Takao Ozawa, a petitioner for naturalization. Aliens—Naturalization—Japanese: A person of the Japanese race born in Japan is not eligible to citizenship under the naturalization laws. Rev. Stat., sec. 2169. Petition for naturalization. Takao Ozawa, *pro se*. Horace W. Vaughan, United States District Attorney, and J. W. Thompson, Assistant United States Attorney, opposed.]

This petition for naturalization is opposed by the United States district attorney on the ground that the petitioner being, as the facts are, a person of the Japanese race and born in Japan, is not eligible to citizenship under Revised Statutes, section 2169, which limits naturalization to "free white persons" and those of African nativity and descent. The other qualifications are found by the court to be fully established, and are conceded by the Government. Twenty years' continuous residence in the United States, including over nine years' residence in Hawaii, graduation from the Berkeley (Calif.) High School, nearly three years' attendance at the University of California, the education of his children in American schools and churches, the maintenance of the English language in his home, are some of the facts in his behalf. And he has presented two briefs of his own authorship, in themselves ample proof of his qualifications of education and character. He makes the main points that in the statute the word "white" is "not used to exclude any race at all," or in other words is used "simply to distinguish black people from others," and that even in a narrow sense

of the word "white" the Japanese are eligible to citizenship. Also, as to the word "free" in the expression "free white persons," the contention is made, that this word designates the quality of person and implies goodness, worthiness, excluding only improper persons.

The first contention is regarded by the petitioner as supported by the learned opinion of Judge Lowell in the case of *In re Halladjian*, 174 Fed. 834. A brief discussion of this opinion is therefore called for, and may serve to enforce our own conclusions. The syllabus of the case reports the Court as holding:

"That the word 'white' was used to classify the inhabitants and to include all persons not otherwise classified, not as synonymous with 'European,' there being in fact no 'European' or 'white' race as a distinctive class; or 'Asiatic' or 'yellow' race, including substantially all the people of Asia; and hence the term 'free white persons' included Armenians born in Asiatic Turkey."

This is a broad ruling, and although a ruling was required only as to the eligibility of Armenians, it may appear even broad enough to divide the eligible classes into Africans and *all others*, subject of course to the exception, created by a statute of later date, in the case of Chinese. Without questioning Judge Lowell's conclusion that Armenians are eligible to citizenship, it seems that he goes too far in saying (*Id.* 843) that:

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the Federal statutes, and in the publications of the Government to designate persons not otherwise classified."

His citation, for example, of the classification of the Massachusetts census of 1764, which included only whites, Negroes, mulattoes, Indians, and "French neutrals," and that of the Rhode Island census of 1748, which included only whites, blacks, and Indians, would be far from proof that Oriental races, particularly the Japanese, or even the indefinite race or races, were included or thought of at all. The most that would naturally be inferred from the use of the word "white" as a "catchall," as Judge Lowell characterizes it (*Id.* 843), is the inclusion therein of all unclassified inhabitants then in the country and not as a rigid classification to endure for all time and to include particularly persons of the Oriental races or of the so-called "yellow" races, who, as will be seen, have at all times under accepted classifications been regarded as ethnologically distinct from the white race. And the fact that as occasion arose, from the presence of a noticeable number of Chinese or Japanese; those newcomers received in the census reports a special classification, weakens very much the extreme view which may be implied from Judge Lowell's opinion. If the word "white" was a catchall, why was its use not generally continued, to include these later immigrants? Judge Lowell's opinion itself shows that when the Oriental population, as represented first by the Chinese, came to be appreciable, beginning with the census of 1860 (*i. e.*, at the first opportunity after the census of 1850), the word "white" ceased to be used as a catchall to designate those people, but they were specially classified by race. (*Id.* 844; also, 842, quoting from the Eleventh Census, part I, p. xciv.) The fact that such classification was adopted as our population of oriental

peoples became appreciable, belies Judge Lowell's statement, 174 Fed. 843-844, that "after the majority of Americans has come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white." Too much is not to be inferred from the use of the words "white" and "black," or "white" and "negro" in early times when these were undoubtedly the only, or practically the only, classes here other than the Indians. Nor is undue credit to be given to even much later, and recent, census classifications which were "not uniform in all parts of the country." (*Id.* 842-843.) Or where much was left to the discretion of the director of the census. (*Id.* 843.) Far more reliance may fairly be placed upon the considered judgments of courts, rendered at least as early as 1878, or perhaps 1854, in contested cases—upon the judgments of those whose peculiar duty it was to determine the meaning of this word "white."

Such a comprehensive meaning of the word "white" as that contended for, would include Indians, yet the Supreme Court in 1884 did not regard the statute, Revised Statutes, section 2169, as so broad. See *Elk v. Wilkins*, 112 U. S. 94, 104, also the considerably earlier case of *Scott v. Sanford*, 19 How. 393, 420, which says, "Congress might * * * have authorized the naturalization of Indians, because they were aliens and foreigners." If Indians were excepted, then why not also the races of the Orient, who though since found to be more adaptable to our manners and customs, were in the earlier days regarded as strange peoples, of manners and customs incompatible with ours. The fact that more lately we have come to better appreciate that, in the language

of William Elliott Griffis ("The Japanese Nation in Evolution," 24),

"There is no necessary distinction between the oriental and occidental, the brown man and the white man. That the 'yellow brain' and the Japanese heart are ultimately different from those of the Yankee or the Briton is the notion of tradition, not the fact of science,"

does not justify the setting aside of an interpretation well established prior to the date of any of the cases, an incomplete list of fourteen of which is submitted by the petitioner—there being, it is understood, about fifty in all—of Japanese who have been naturalized by State and Federal courts. The earliest of these fourteen cases, that of Seizo Matsumoto, naturalized by a court of Pierce County, Wash., is as recent as January, 1896, two years later than the case of *In re Saito*, 62 Fed. 126, and sixteen or more years subsequent to two cases which took a view broad enough to exclude Japanese. *In re Camille*, 6 Fed. 256, and *In re Ah Yup*, 1 Fed. Cas. 223, No. 104. Indeed, as early as 1827 Chancellor Kent inclined to the same opinion as the two cases just cited; for he says in his Commentaries, volume 2, page 72:

"The act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume this excludes the inhabitants of Africa, and their descendants; and it may become a question, to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of

the Asiatics, and it may well be doubted whether any of them are 'white persons' within the purview of the law."

And in 1854 the dictum of Chief Justice Murray of California in *People v. Hall*, 4 Cal. 399, 403, 404, is that "the word 'white' has a distinct signification, which *ex vi termini* excludes black, yellow, and all other colors."

In the case of *Ah Yup*, *supra*, in holding that Chinese are not white persons, Circuit Judge Sawyer in 1878 said:

"The words 'white person,' as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be legally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But those words in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race.

"In speaking of the various classifications of races, Webster in his dictionary says: 'The common classification is that of Blumenbach, who makes five. (1) The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia; (2) The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; (3) The Ethiopian or Negro (black) race, occupying all Africa, except the North; (4) The American, or red

race, containing the Indians of North and South America; and (5) The Malay, or brown race, occupying the islands of the Indian Archipelago, etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair, and skull. Linnæus makes four divisions, founded on the color of the skin: (1) European, whitish; (2) American, coppery; (3) Asiatic, tawny; and (4) African, black. Cuvier makes three—Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race.' (See New American Encyclopedia, title 'Ethnology.')

"Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term 'white person' as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term 'white person' any other than an individual of the Caucasian race, I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolian.

"* * * Whatever latitudinarian construction might otherwise have been given to the term 'white person,' it is entirely clear that Congress intended by this legislation to exclude Mongolians from the right of naturalization."

This case was determined four years before the enactment of a special statute prohibiting the naturalization of Chinese, 22 Stat. 53, 61. It is quoted at length to include its review of the then prevailing race classifications.

In 1880 in *In re Camille*, *supra*, 6 Fed. 257, Judge Deady approved of Judge Sawyer's view above quoted, though the case involved not a person of an oriental race but one of Indian blood. See also, the specific reference to the Chinese, *Id.*, 258.

In 1894, Circuit Judge Colt, in the case of *In re Saito*, *supra*, rules directly on the eligibility of Japanese. He says:

"The history of legislation on this subject shows that Congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

"The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

"From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races.

"And this is true from a scientific point of view. Writers on ethnology and anthropology base their

division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies in the foundation of the classification which scientists have adopted."

Judge Hanford in the case of *In re Buntaro Kumagai*, 163 Fed. 922, 924, is of opinion that:

"The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

He cites in support of this opinion the cases of *Ah Yup and Saito, supra*, and also the case of *In re Yamashita*, 30 Wash. 234, 70 Pac. 42 (1902). His opinion is followed in the case of *In re Knight*, 171 Fed. 299, in which the applicant was one-quarter Japanese and one-quarter Chinese and in which Judge Chatfield holds, *Id.*, 300, that neither Chinese nor Japanese can be naturalized—though, it is true, it was only necessary for him to hold for the purposes of the case, that the substantial element of Chinese blood was sufficient to exclude the petitioner, regardless of the eligibility of Japanese. And the Circuit Court of Appeals of the Fourth Circuit in *Bessho v. United States*, 178 Fed. 245, and Judge Cushman in *In re Young*, 198 Fed. 715, held expressly that Japanese aliens are ineligible to citizenship.

To meet any argument that the enactment of a special statute prohibiting naturalization only of

Chinese implies the eligibility of the Japanese, who are not included in any special prohibition, reference is made to *In re Kanaka Niau*, 21 Pac. 993-994, 6 Utah, 259 (1889), and *Bessho v. United States*, 178 Fed. 245, 248 (Circuit Court of Appeals); also in *In re Ah Yup*, 1 Fed. Cas. 224, decided as above noted, before the enactment of the special prohibition against Chinese, *In re Saito*, 62 Fed. 127, and *Fong Yue Ting v. United States*, 149 U. S. 698, 716.

As against these authorities, no reported case is known in which a person of the Japanese race has been naturalized, in which the court has rendered a written opinion to justify its ruling or in which there has been a contest to evoke the most thorough consideration. There are recent judicial opinions, that the statute in its present form is not to be "construed in the light of the knowledge and conception of the legislators who passed the original statute in 1790, without regard to the more definite and special knowledge and conception which must be attributed to the legislators who, upon reconsideration of the whole subject, enacted subsequent statutes including that now in force." *Dow v. United States*, 226 Fed. 145, 147. See also *In re Muddari*, 176 Fed. 465, 467, and a learned opinion of Judge Morrison of the Superior Court of California, rendered May 7, 1914, in the case of *In re Sakharan Ganesh Pandit*. But the *Dow case*, for example, in using the language just quoted and in referring to more recent legislation, had in mind the legislation of 1875 in which the words "free white persons," omitted by error from the revision of 1873 (62 Fed. 127) were restored. 226 Fed. 147. And, aside from the circumstance that the decisions just referred to were dealing with border-line cases of races closely related to what may

be loosely called the "Europeans," who were perhaps in 1780 here considered as the only white people (226 Fed. 145, 147, 148), it is of most practical importance to bear in mind that the ethnological divisions which classed the Japanese as of the Mongolian or yellow race, were what the legislators of 1875 and the courts thereafter down even to the present have had to rely upon as their guides. See quotation in *In re Ah Yup, supra* (1878), from Webster's Dictionary, probably the most widely circulated work in America except the Bible, and even the very recent edition of the Encyclopedia Britannica, 11th ed., vol. 9, page 851. This classification was undoubtedly well known in this country early in the last century, as it was in Germany before 1790, the date of the original enactment of the statute. Even if, as the petitioner contends, Blumenbach's classification is unscientific (see *In re Dow*, 213 Fed. 355, 358, 359, 365; *In re Mudarri*, 176 Fed. 466, 467), nevertheless it has not yet been superseded so far as to assimilate the Japanese with what for many years, at least as early as 1854, and especially before 1875, has been generally regarded as the "white" race.

Tylor, one of the highest authorities, in his book of 1881, "Anthropology" (Appleton's ed. 63, 96-98), points out that the Japanese have characteristics of the "Mongoloid type of man" in which one prominent feature is that "their skin is brownish yellow." The most recent encyclopedic authority (9 Enc. Britt. 11th ed. (1910), 851) classes the Japanese as Mongolic or yellow, though placing the Ainos, a small element of the people of Japan, as Caucasian or white. See also 15 *Id.* 165. In addition to this unobstructed current of authority reference may be had to a very

late work, "A History of the Japanese People," by Capt. F. Brinkley, included by Dr. William Elliot Griffis in a list of the English scholars who "have made obsolete most of the old European learning about Japan" ("The Japanese Nation in Evolution," 20).

"The Japanese are of distinctly small stature. * * * Their neighbors, the Chinese and the Koreans, are taller. * * * Nevertheless, Prof. Dr. Baelz, the most eminent authority on this subject, avers that 'the three great nations of eastern Asia are essentially of the same race,' and that observers who consider them to be distinct 'have been misled by external appearances.' Brinkley, History, etc., *supra*, 57-58, see also 59, 60. That the Japanese have, however, an element of white, Caucasian or Iranian, blood is noted. *Id.* 58, see also 45, 54, 55."

Another recent book may be quoted as giving the opinion of a Japanese educator, "The Life and Thought of Japan," by Okakura Yoshisaburo (published by E. P. Dutton & Co., 1913):

"And as to those swarms of immigration from China and Korea, who crossed the sea at various periods in the early days of Japanese history, it did not take many generations before they came to adopt the views of the people with whom it was their interest in every way to get mixed, and thus they lost their own identity. In this manner, notwithstanding an extensive admixture of foreign elements to our original stock, we find ourselves as closely unified a nation as if we had been perfectly homogeneous from the very beginning. One and the same blood is felt to run through our veins, characterized by one and the same set of religious and moral ideas. This may perhaps be due to the fact that the three ele-

ments—the conquering, the conquered, and the immigrating—belonged originally to the same Mongolian race, with very little trace of any mingling of Ainu and Malayan blood. [*Id.*, 48, 49.]

“You will come, at least to some extent, to acknowledge the truth of the statement so often made in books on Japan, that there are two distinct racial face types among the present Japanese * * *. Be it remembered that both types are Mongol. Both have the yellowish skin, the straight hair, the scanty beard, the broadish skull, the more or less oblique eyes, and the somewhat high cheek bones, which characterize all well-established branches of the Mongol race. [*Id.* 41.]

“The relation here displayed between the living and the departed may be considered as a characteristic of the Mongolian race to which both the Japanese and the Chinese belong. [*Id.* 54.]”

Whether these views just quoted are wholly accurate or not, I do not undertake to say. They are at all events in line with the statements of scientific works which have been, as already intimated, the guides of our courts in all cases known to have been contested or in which the court rendered a written opinion,—even though recognizing that there is in the Japanese an element of white blood. See reference to Brinkley, *supra*.

Dr. Griffis' interesting book, in a broad spirit of tolerance, notable in one for forty years in the closest touch with Japan and for some years a resident there, goes far to demonstrate the conclusion that “the Japanese are not Mongolian.” “The Japanese Nation in Evolution,” 400. Rev. Dr. Doremus Scudder, of Honolulu, who is himself intimately acquainted with the Japanese people, and who may be termed a friend

of the court, has submitted in behalf of the petitioner this authority as tending at least to support the view that the Japanese are "white persons" even in a narrow sense of those words. But Dr. Griffis, after all, does not seem to be at variance with the common authorities on ethnology. It is plain that he is speaking of the later development of the Japanese away from all that is narrow in the sense of "Mongolian," or "Oriental,"—of their "both deserving and winning success" (*Id.* 400) in competition, or rather comparison, with the most progressive and enlightened peoples of the world. He recognizes the Mongolic element constantly. "White men, belonging to the great Aryan family and speaking a language akin to the Indo-Germanic tongues, were the first 'Japanese,' who are a composite and not a pure 'Mongolian' race. Their inheritance of blood and temperament partakes of the potencies of both Europe and Asia." *Id.* 1, also 21, 25, 349. He also recognizes the Malay element, which—at least "the Malay peoples of the Eastern Archipelago"—the last edition of the Encyclopedia Britannica includes in the Mongolic or yellow division of the races, though "less typical" but with the "Mongolic elements so predominant as to warrant inclusion." Says Dr. Griffis (*Id.* 30), "Those most familiar with the races, the Mongol, Aryan, and the Malay, now so differentiated, consider that in the Nippon composite the Malay strain predominates."

Also *Id.* 30-31 et seq. Though Dr. Griffis believes that "the basic stock of the Japanese people is Aino" (a white people) * * * "by 'basic stock' * * * mean(ing) the oldest race in the islands" (*Id.* 5, also 1), yet he speaks of the Ainos as having been "crowded out" (*Id.* 9)—elsewhere characterizing the process as absorption not elimination (*Id.* 26);

and Brinkley, History, etc., *supra*, 56 (see also 44), notes the "steady extermination for twenty-five centuries" of the Ainu element, characterized by him as having "left as little trace in the Japanese nation." *Id.* 58.

Intelligent men, of course, agree with Dr. Griffis that the words "Mongolian" and "Oriental," as mere epithets, can bear no sense of unworthiness or inferiority in the case of the Japanese people.

A few words are called for by the cited examples of the Magyars of Hungary and of the very dark Portuguese, who are both freely admitted to citizenship, in spite of the fact that the former are Mongolic in origin and that the latter are in a strict sense of the word not "white." Many of the decisions admit the difficulties inherent in the statutory classification, and even Judge Lowell has declared that he "greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in section 2169." *In re Mudarri*, 176 Fed. 465, 467. Indeed in this latter case his language seems to cast doubt upon the practicability of the rule applied in the *Halladjian case*. He says, 176 Fed. 467:

"No modern theory has gained general acceptance. Hardly anyone classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz, any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting clas-

sification of persons in the usage of successive generations and of different parts of a large country."

But the examples just cited may be regarded as exceptional. Centuries before our first legislation on naturalization, the Magyars had "become physically assimilated to the western peoples." 17 Enc. Britt., 11th ed., 393, 394. "In their new environment their Mongolic physical type has gradually conformed to the normal European standard." Webster's New International Dictionary (1913), title "Magyar," quoting A. H. Keane. They have long been "one of the dominant people of Hungary—which they conquered at the close of the ninth century" (Id.); and they, with the Portuguese of varying degrees of color are within the meaning of "white," as commonly understood, and as explained by Judge Cushman in the case of *In re Young*, 198 Fed., 716, 717:

"The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites' or 'dark whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

"It is just as certain that, whether we consider the Japanese as of Mongolian race or the Malay race, they are not included in what are commonly understood as 'white persons.' "

See also *Dow v. United States*, 226 Fed. 145, 147.

Though the intent of the word "white" is determinative of the case, we may well dispose of the petitioner's argument that the use of the word "free" in the expression "free white persons" emphasizes

the element of worthiness, good quality, as against the element of color. The use of the word "free" in the debates in the Constitutional Convention in 1787 affords most reliable evidence of what the word meant at about and shortly before its first use in the naturalization laws. It is recorded that Gouverneur Morris in moving to insert "free" before the word "inhabitants," with reference to the apportionment [40] of members of the House of Representatives, used the word as the opposite of "slave." Madison's Journal of the Constitutional Convention (Albert Scott & Co., Chicago, 1893), 478. And such has always been its intent, not only when this statute had its origin, but shortly after the Civil War, when the statute was revised after a brief suspension—though the retention of the word "free" had then become unnecessary.

As lately as 1906 Congress went over the whole law of naturalization, and yet in the face of the well-known rulings of the published decisions which had interpreted the particular section here in question, the section was left just as it was. This is a very persuasive reason for the conclusion that Congress acquiesced in and adopted the interpretation which the courts had put upon its own work. 226 Fed. 145, 148. The remedy for uncertainty in the statute, or for its unfairness or inconsistency with the theory and spirit of our institutions, lies, of course, with the legislative body.

In view of the foregoing authorities and considerations, the court finds that the petitioner is not qualified under Revised Statutes, section 2169, and must therefore deny his petition; and it is so ordered, in spite of the finding hereby made that he has fully established the allegations of his petition and, except

as to the requirements of section 2169, is in every way eminently qualified under the statutes to become an American citizen.

(Sgd.) CHAS. F. CLEMONS,
*Judge of the United States District Court
for the Territory of Hawaii.*

○

OCT 8 1922

TRANSB
OLE

IN THE

Supreme Court of the United States

October Term, 1922

[No. 1.]

TAKAO OZAWA,

Appellant,

against

THE UNITED STATES,

Appellee.

[No. 177.]

TAKUJI YAMASHITA and CHARLES HIO KONO,

Petitioners,

against

J. GRANT HINKLE, as Secretary of State of the State
of Washington,

Respondent.

On Writ of Certiorari to the Supreme Court of the
State of Washington

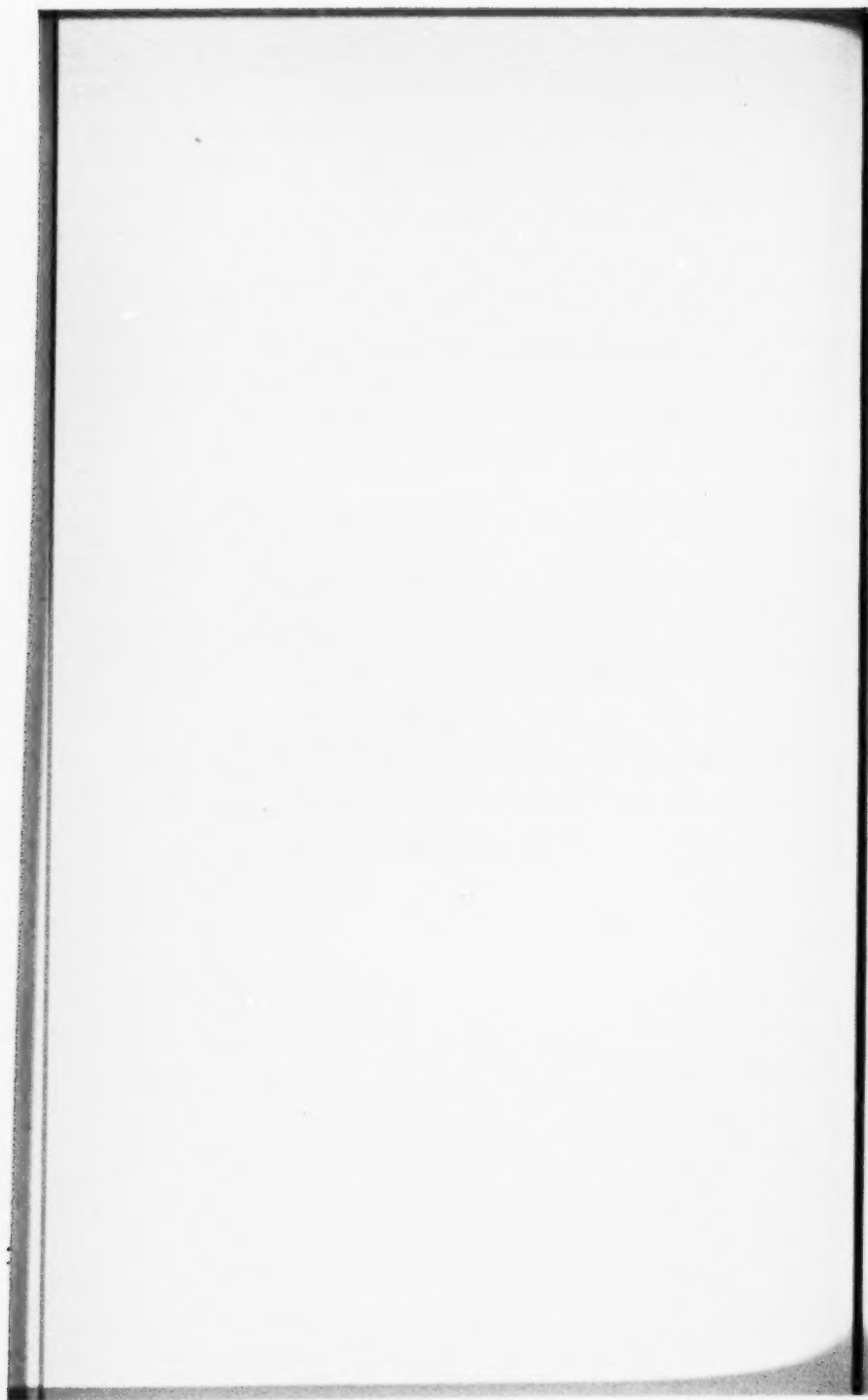
REPLY BRIEF FOR PETITIONERS

GEORGE W. WICKERSHAM,

Counsel for Appellant and Petitioners Above Named.

Cases Cited.

	PAGE
Alverto, In re, 198 Fed., 688.....	9
Bantista, Re, 245 Fed., 765.....	7
Duplex Printing Press Co. v. Deering, et al., 254 U. S., 443	6
Giralde, Re, 226 Fed., 826.....	7
Halladjian, In re, 174 Fed., 834.....	3
Kumagai, In re, 163 Fed., 922.....	10
Lampitoe, In re, 232 Fed., 382.....	9
Low Wah Suey v. Backus, 225 U. S., 460.....	11
Rodriguez, In re, 81 Fed., 337.....	12
Yamashita, In re, 30 Wash., 234, 70 Pac., 482.....	3



IN THE
Supreme Court of the United States
October Term, 1922

TAKAO OZAWA

Appellant,

vs.

No. 1

THE UNITED STATES,

Appellee.

TAKUJI YAMASHITA AND CHARLES HIO
KONO,

Petitioners,

against

No. 177

J. GRANT HINKLE, as Secretary of State of
the State of Washington,
Respondent.

**REPLY BRIEF FOR APPELLANT AND
PETITIONERS.**

The United States has filed a brief in the *Ozawa* case which it also asks leave to file in the *Yamashita* case as *amicus curiae*. The respondent in the *Yamashita* case, the Secretary of State of the State of Washington, has filed a brief in that case. We beg to submit a few words in reply to both briefs.

The contention of the respondents in both cases is in effect, that under the naturalization laws of the United States, only the following classes of persons may be naturalized:

Aliens of African nativity—including every race which inhabits that continent, from the Moors and Egyptians in the north, through the various gradations of

blacks, in the Soudan, Senegal, Liberia and other equatorial countries, to the Portuguese, Dutch and British in the south, and persons of African descent, no matter from which of those races or tribes they may come—white, black, brown or yellow in color;

All European races, from the blue-eyed and yellow-haired, ruddy complexioned Scandinavians, to the dark, swarthy, brown, Portuguese, Southern Italian, and perhaps the European Turk. Also Armenians, Syrians, Hindoos, Parsees, Filipinos, Porto Ricans, Half-breed Filipinos, Mexicans.

But that the cultivated Japanese, whose artistic and literary development and high civilization extends back for centuries, and who have shown themselves to be the equals in intellectual power and culture of any race in the world, are excluded from the right of naturalization, no matter what may be their personal fitness, intellectually and morally, for participation in our citizenship. The question for the Court is whether or not this construction is required by the laws of the land.

In the *Ozawa* case, the District Court of Hawaii, to which the Appellant applied for naturalization, found that, aside from the question of race, he has all the other qualifications for citizenship.

“Twenty years continuous residence in the United States, including over nine years’ residence in Hawaii, graduation from the Berkeley (California) High School, nearly three years’ attendance at the University of California, the education of his children in American schools and churches, the maintenance of the English language in his home, are some of the facts in his behalf. And he has presented two briefs of his own authorship, in themselves ample proof of his qualifications of education and character.”

Both the petitioners in the *Yamashita* case were admitted to citizenship by the Superior Court of Pierce County, Washington, in May, 1902. No steps ever have

been taken to revoke the certificates of naturalization issued to them. Yet the Supreme Court of Washington has refused them admission to the bar of that State (*In re Yamashita*, 30 Wash. 234), and the Secretary of State of the State of Washington has refused to receive and file a certificate of incorporation prepared and executed by them in conformity with the general corporation laws of that State, upon the ground that their naturalization must be considered void because they are of Japanese birth.

The *Yamashita* case must be governed by U. S. Revised Statutes, "Title XXX, Naturalization," being the statute in force in 1902, when certificates of naturalization were issued to the petitioners.

The *Ozawa* case, coming up, as it does, on certificate from the Circuit Court of Appeals of the Ninth Circuit, asking instructions, depends upon the statute now in force, being the Act of June 29, 1906, as amended by the Act of May 11, 1918 (40 Stats., p. 548). Great stress is laid by the respondents in both cases upon the fact that in eight cases, the lower federal courts, and in one case, a state court, have held Japanese not to be qualified for citizenship, and in two cases the lower federal courts have held Koreans likewise disqualified; but no reference is made to the fact that in a large number of cases, impossible to ascertain without a more comprehensive inquiry than would be open to petitioners, the courts have granted certificates of naturalization to Japanese persons. Judge LOWELL in *In re Halladjian*, 174 Fed., 834, 843, says:

"While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classi-

fied as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

Until the period referred to by Judge LOWELL, when the majority of Americans had come to believe that great differences separate the Japanese from other immigrants—which was when the clamorous opposition to their superior industrial efficiency arose in California, within the last few years—Japanese were naturalized by many courts. So that the fact that in the small number of cases cited in the briefs of the respondents, naturalization was refused them, can have but little weight, unless the reasoning by which the courts reached their conclusions in those cases has persuasive or controlling influence with this court.

We have pointed out in our main brief the varying and conflicting reasoning of the different judges in the cases referred to, and we submit that no satisfactory rule of construction can be deduced from the opinions cited.

The main proposition upon which the respondents rest is that Title XXX of the Revised Statutes, entitled Naturalization, enacted that

"the provisions of this title shall apply to aliens, being free white persons and to aliens of African nativity and to persons of African descent."

That in the *Yamashita* case, petitioners' right was limited by this provision, and that being Japanese, they are not free white persons, and, therefore, not within the provisions of that title. The contention in the *Ozawa* case is, that although Congress in 1906 enacted a comprehensive statute, entitled

"An act to establish a bureau of immigration and naturalization and to provide for an uniform rule for the naturalization of aliens throughout the United States" (34 Stats., 596)

which act contains no such provision as that embodied in Section 2169 R. S., yet, inasmuch as Congress did not specifically repeal that section, it must be presumed that it meant to carry over its provisions into the Act of 1906, although it did not say so, and that the right of naturalization under the Act of 1906 is still restricted by Section 2169 R. S. to Africans and white persons.

In the brief of the United States, it is contended that the Act of 1906 is not complete in itself, but is limited in its application to the eligible classes of persons mentioned in Section 2169 R. S. In answer to this it may be pointed out that the act purports to be complete in itself. Its title declares it to be

"An act * * * to provide for an uniform rule for the naturalization of aliens throughout the United States."

All the naturalization laws previously enacted, from 1790 down, have been similarly entitled, being enacted pursuant to the constitutional grant to Congress of power

"to establish an uniform rule of naturalization * * * throughout the United States" (Art. I, Sec. 8).

Speaking of this act, MORRIS, *J.*, in the Dist. Court, Mass., in deciding that Section 30 of the act authorizing the naturalization under certain circumstances of Filipinos was not restricted by R. S., Section 2169, said: "The act of which Section 30 forms a part was obviously intended to cover fully the subject of naturalization."

The argument that Section 2169 is to be imported into the Act of 1906, is supported by reference to certain colloquies between members of one House or the other of Congress during the discussion of the bill. Its legislative history is quoted at great length in the brief of the respondent in the *Yamashita* case. With respect to

this, it may be said, as the Court did in *Duplex Printing Press Co. v. Deering, et al.*, 254 U. S., 443, 474, that

“By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body.”

To bring the case within the exceptions to that rule, reference is made to the fact that in the statement made by Representative Bonyng of the Naturalization Committee of the House of Representatives, he said that the bill presented did not change the fundamental law in reference to naturalization, except in two particulars: one, that before an alien can be naturalized, he must be able to write in his own or the English language, and able to read, speak and understand English, and two, he shall in his petition for naturalization declare that it is his intention to reside permanently in the United States. The rest of the bill, he said, in effect was either administrative or provided a code of procedure (40 Cong. Rec., pp. 3640-3643).

But, after all, the meaning of a statute, like that of a will, must be determined from the language employed.

Declarations of intention, which are entirely at variance with the structure of the bill, cannot change the effect of the legislation. The act purports to be complete in itself. It repealed certain specific sections of the Revised Statutes, leaving unrepealed Sections 2166, 2169, 2170, 2171, 2172 and 2174. Section 2170 provides:

“No alien shall be admitted to become a citizen who has not for a continued term of five years next preceding his admission resided within the United States.”

Substantially the same provision is included in Section 4 of the Act of 1906, paragraph fourth, which provides:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least and within the state or territory where such court is at the time held one year at least * * *."

Certainly this provision covers applications under the Act of 1906, without any reference to the Revised Statutes, but it left in the Revised Statutes, Section 2169, to be applicable to all of the cases within the unrepealed sections of that title. The construction put upon Section 30 already has been referred to.

See also

Re Bantista, 245 Fed., 765;

Re Giralde, 226 Fed., 826.

The fact that the forms set forth in the Act of 1906, include distinctive marks of personal description, such as "color, complexion, height, weight, color of hair, color of eyes, and other visible distinctive marks," does not import into that act the requirement that the applicant shall be white or African. These requirements evidently are for the purpose of identification.

Great stress also is laid by the respondent in the *Yamashita* case, upon the legislation of 1918, amending Section 4 of the Act of 1906 by adding a number of subdivisions. The paragraph at the end of Section 2 of the Act of 1918 (40 Stats., p. 547), provides that

"* * * Nothing in this act shall repeal or in any way enlarge Section twenty-one sixty-nine of the Revised Statutes except as specified in the seventh subdivision of this act and under the limitation therein defined * * *."

This, it is argued, is a legislative recognition of the fact that Section 2169 remains unrepealed. But the petitioners have not contended that Section 2169 was repealed. Their contention is, that it remains, as it always was, applicable to Title XXX of the Revised Statutes, and has not been made applicable by any act of Congress to the Act of 1906. A somewhat amusing colloquy in the House of Representatives when this bill was under consideration throws a light upon the loose methods of legislation which result in the obscurities which courts are expected to remove. On May 3, 1918, the report of the Conference Committee was discussed in the House. Mr. Moore asked:

“How would that apply in the case of a Chinaman or a Japanese? The term ‘any alien’ is pretty broad. It applies to a Filipino in the service. (He was referring at that time to the provisions of the new Subdivision 7.) Is it possible it would apply also to a Chinaman or a Jap?”

To which Mr. Burnett replied:

“This does not repeal the existing law which excludes Chinese and Japanese from citizenship.”

“The law reads:

“‘That hereafter no state court or court of the United States shall admit Chinese to citizenship and all laws in conflict with this act are hereby repealed.’”

[This law is the Act of May 6, 1882, Section 14 (22 Stats. 58).]

In other words, it is quite obvious that at that time, Mr. Burnett, and possibly the Committee, had only considered the effect of the Chinese exclusion acts.

Later on, Mr. Moore again returned to the question, and Mr. Burnett then read the provision in the bill reading:

“Nothing in this act shall repeal or in any way enlarge Section twenty-one sixty-nine of the Re-

vised Statutes except as specified in the seventh subdivision of this act and under the limitations therein defined;"

and stated that *an Asiatic was not entitled to naturalization* (56 Cong. Rec., pp. 6000-6001). [Apparently he had not had his attention called to the decisions cited in our principal brief holding qualified for naturalization Parsees, Armenians, Syrians and Hindoos (see pp. 6-16.)] Mr. Norton asked how the naturalization of Chinese or Japanese in the service was guarded against by reference to Section 2169 (p. 6003), to which Mr. Burnett replied:

"Section 2169 is a declaration as to who shall be entitled to naturalization—that is white persons and aliens of African nativity and persons of African descent; and in not repealing that, and specifically stating that it does not repeal that, it constitutes a limitation upon the scope of this law so far as the naturalization of Chinese and Japanese is concerned."

He stated that that had been the construction of the courts; that the courts had said that that language excludes brown persons (pp. 6003, 6004).

In speaking as to the scope of the bill, Mr. Sabath, a member of the committee which framed it, stated that the bill

"applies to all aliens who are now serving in the United States Army, Navy, or Marine Corps, it matters not what nationality they are." (p. 6024.)

Notwithstanding this construction placed upon the act by the Committee, Judge LEARNED HAND, in the District Court of the Southern District of New York in the case of *In re Lampitoe*, 232 Fed., 382, refused naturalization to the son of a Spanish father and a Filipino mother who was born in Manila and served in the United States Navy. Similar decisions also have been rendered *In re Alverto*, 198 Fed., 688 (THOMPSON, J., E. D. Pa.);

In re Kumagai, 163 Fed., 922 (HANFORD, J., W. D. Wash.).

Finding that Section 2169, R. S., has not been repealed, is a very different thing from a decision that, although by its own express language it applies only to "this title," i. e., Title XXX of the Revised Statutes, in which it is found, by judicial construction it shall be made applicable to something else, namely, to the provisions of the new statute enacting a

"uniform rule for the naturalization of aliens throughout the United States,"

in which it does not appear. Respondent in the *Yamashita* case, claims that the word "title" was simply used in the original revision for the purpose of convenience, and that as used in the revision of 1873, it referred to all existing laws with respect to naturalization. We are utterly unable to understand the basis for any such contention. The Revised Statutes are divided into a number of titles and chapters. Title XXX contains but one chapter headed "Naturalization." That title is divided into ten sections, 2165 to 2174, both inclusive. There is not a line in it that suggests that the title refers to anything but the sections embraced in it.

Finally, counsel seek to buttress their argument by referring to a draft compilation of laws prepared by a committee of the House of Representatives and passed by the House May 16, 1921, which groups all existing laws relating to immigration and naturalization under a single chapter and includes 2169 as a part of that chapter. It will be observed that this compilation has not yet been passed by the Senate, and can have no other weight than that which may be derived from the fact that the draftsmen of that section and the House chose to prepare such a formulation for the Senate's consideration. It can have no effect whatever upon the construction of existing law.

The opinion of the Attorney General, cited at page 27 of his brief, by respondent in the *Yamashita* case (27

Opinions, 507), involved the question whether or not the words "who might herself be lawfully naturalized," in the Act of 1895 and R. S., 1994, referred to a class or race who might be lawfully naturalized, or whether the provisions of the Immigration Law to character, etc., also were applicable. The woman whose case was there under consideration was a Belgian, who had been arrested charged with being an alien prostitute, who, between the date of her arrest and the date of the habeas corpus proceedings, had married a citizen of the United States. It was merely assumed in the opinion that under the existing naturalization law any free white person was entitled to naturalization, and the question examined and answered was whether or not an alien woman could acquire citizenship through marriage to a citizen, unless she complied with all the conditions of the immigration laws. The only point in the opinion was that the statute referred to did not import compliance with anything but the naturalization laws.

Considering the question under the Revised Statutes as applicable to Yamashita, and, for the sake of argument, assuming that the same section, 2169, applies to Ozawa, the final question remains, what is "a free white person" within the meaning of that statute. Interpreted literally, the naturalization court must in every instance inspect the applicant and determine what his color is. If we get away from this, the literal construction, we are on an uncharted sea, the vagaries of which are evidenced by the conflicting decisions cited in the briefs.

Respondents in both cases glide softly over the fact that when Congress determined to exclude the Chinese, it was not content to rest upon any such interpretation of Section 2169 as that contended for by respondents, but legislated specifically against the naturalization of any Chinese person by a series of statutes, from 1882 to 1904, enumerated on page 19 of petitioner's supplemental brief in the *Ozawa* case.

In *Low Wah Suey v. Backus*, 225 U. S., 460, 473, the question was whether a Chinese woman, not born in this

country, could become a naturalized citizen under the laws of the United States, and, therefore, could acquire citizenship by marriage. The Court referred to the Act of May 6, 1882 (22 Stats. 58, 61), as establishing the fact that she could not become such citizen. The treaty with China of December 8, 1894, also, while securing to Chinese temporarily or permanently residing in the United States the protection of their persons and property and all rights that are given by the laws of the United States to the citizens of the most favored nation, specifically excepted therefrom "*the right to become naturalized citizens.*" It certainly is not without significance that the Treaty with Japan of March 21, 1895, provided that

"the citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party and shall enjoy full and perfect protection for their persons and property,"

and that no exception of the right to become a naturalized citizen is contained therein.

It is earnestly submitted, that giving the fullest force and effect to R. S. Section 2169, the only logical construction is to hold with Judge LOWELL that the word "white" has generally been used in the Federal and in the State courts, in the publications of the United States and in its classification of its inhabitants, to include all persons not otherwise classified; and that, as Judge MAXEY suggested in *In re Rodriguez* (81 Fed. 337), the words were used in the original Act of 1790, for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country, and that if Congress desires to give a more restricted meaning to the phrase, it must do what hitherto it has refrained from doing, that is, clearly express the intention that they shall be so limited.

GEORGE W. WICKERSHAM,
Counsel for Appellant and Petitioners Above Named.

TAKAO OZAWA v. UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT.

No. 1. Argued October 3, 4, 1922.—Decided November 13, 1922.

1. Section 2169 of the Revised Statutes, which is part of Title XXX dealing with naturalization, and which declares: "The provisions of this Title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent," is consistent with the Naturalization Act of June 29, 1906, and was not impliedly repealed by it. P. 192.
2. Revised Statutes, § 2169, *supra*, stands as a limitation upon the Naturalization Act, and not merely upon those other provisions of Title XXX which remain unrepealed. P. 192.
3. The intent of legislation is to be ascertained primarily by giving words their natural significance; but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, the court must look to the reason of the enactment, inquiring into its antecedents, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning, in order that the purpose may not fail. P. 194.
4. The term "white person," as used in Rev. Stats., § 2169, and in all the earlier naturalization laws, beginning in 1790, applies to such persons as were known in this country as "white," in the racial sense, when it was first adopted, and is confined to persons of the Caucasian Race. P. 195.
5. The effect of the conclusion that "white person" means a Caucasian is merely to establish a zone on one side of which are those clearly eligible, and on the other those clearly ineligible, to citizenship; individual cases within this zone must be determined as they arise. P. 198.
6. A Japanese, born in Japan, being clearly not a Caucasian, cannot be made a citizen of the United States under Rev. Stats., § 2169, and the Naturalization Act. P. 198.

QUESTIONS certified by the court below, arising upon an appeal to it from a judgment of the District Court of Hawaii which dismissed a petition for naturalization. The case was argued with *Yamashita v. Hinkle*, *post*, 199, and was decided at the same time.

Mr. George W. Wickersham, with whom Mr. David L. Withington was on the briefs, for Takao Ozawa.

The Act of June 29, 1906, establishes a uniform rule of naturalization, and that rule is not controlled or modified by § 2169, Rev. Stats.

The constitutional grant of power, the title of the act, its scope and terms, show that, save in definitely excepted cases, it is a complete, exclusive and uniform rule of naturalization.

Congress exercised this power in the first Congress, second session, and passed the Act of March 26, 1790, 1 Stat. 103, entitled, "An Act to establish an uniform rule of naturalization." This act was repealed by a like act with a like title in 1795, and that by the Act of April 14, 1802, 2 Stat. 153, which in turn was entitled, "An Act to establish an uniform rule of naturalization." This in turn became Title XXX of the Revised Statutes, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled, "An Act To establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

This act purports to be a complete act. It provides, in § 3, for exclusive jurisdiction of naturalizing aliens, and in § 4, "that any alien may be admitted to become a citizen of the United States in the following manner, and not otherwise;" followed by five paragraphs prescribing the conditions of admission, among them, in paragraph two, that the petition shall set forth "every fact material to his naturalization and required to be proved upon the final hearing of his application." In § 27 the form of this petition is given, containing the allegations which Congress believed were "material to his naturalization and required to be proved," but nothing with reference to color or race.

The intent of Congress to enact, and its belief that it had enacted, a uniform rule for naturalization, covering the entire subject and even giving to the rules and regulations the force of law, are clear. *In re Brefo*, 217 Fed. 131; *United States v. Rodiek*, 162 Fed. 469; *Bessho v. United States*, 178 Fed. 245; *In re Leichtag*, 211 Fed. 681; *In re Mallari*, 239 Fed. 416; *Hampden County v. Morris*, 207 Mass. 167; *United States v. Ginsberg*, 243 U. S. 472; *United States v. Ness*, 245 U. S. 319; *United States v. Peterson*, 182 Fed. 289, 291.

The unrepealed sections of Title XXX and a few other special acts provide for naturalization in cases excepted from the uniform law. *In re Kumagai*, 163 Fed. 922; *In re Loftus*, 165 Fed. 1002; *United States v. Meyer*, 170 Fed. 983; *In re McNabb*, 175 Fed. 511; *In re Leichtag*, *supra*; *United States v. Lengyel*, 220 Fed. 720; *In re Sterbuck*, 224 Fed. 1013; *In re Tancrel*, 227 Fed. 329.

Section 2169 is not restrictive in terms, and if restrictive only applies to Title XXX, Rev. Stats., and the cases excepted from the general rule. Section 2169, as originally enacted, is an enlarging provision, derived from the Act of 1870, c. 254, 16 Stat. 256, which extended the naturalization laws to aliens of African nativity and to persons of African descent. It is not a restrictive declaration; and the introduction into it of the words "being free white persons and to aliens," by the Act of 1875, c. 80, 18 Stat. 318, does not change the provision from an enlarging to a restrictive one. There is nothing in the language used to show the intention of Congress to restrict naturalization to free white persons and Africans by this amendment of 1875.

If construed otherwise, naturalization from the passage of the Revised Statutes to the amendatory Act of 1875, would have been restricted to those of African nativity or descent.

The Chinese Exclusion Act of May 6, 1882, c. 126, § 14, 22 Stat. 58, 61,—passed after it had been held that the

language of § 2169 excluded the Chinese, *In re Ah Yup*, 5 Sawy. 155; and a half Indian, *In re Camille*, 6 Fed. 256,— supports this view. In any event, § 2169 is applicable only to Title XXX and does not apply to the Act of June 29, 1906.

The origin of the Act of 1906 shows that it was intended to be a complete scheme for naturalization, the test being "fitness for citizenship," with no discrimination against Japanese. Message of President Roosevelt, December 5, 1905, 40 Cong. Rec., pt. 1, p. 99. This policy, announced by President Roosevelt, has been steadily followed in legislation in respect both to naturalization and immigration, including the Immigration Act of 1917.

These acts show the traditional policy of the United States to welcome aliens, modified only by restrictions against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race.

Numerous Chinese Exclusion Acts have been passed; but there is no line in any statute before or since 1875 which indicates any intention to classify the Japanese with those excluded or to discriminate against them in any way.

This Court in a recent case, in reviewing the history of the Immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers) who are undesirable as members of the community, even if previously domiciled in the United States. *Lapina v. Williams*, 232 U. S. 78; *In re Gee Hop*, 71 Fed. 274-275.

The Immigration Act of 1917, and the circumstances of its passage in Congress, show the clear intention of that body to make no declaration that Japanese are excluded from naturalization. Any other construction would be violative of the existing treaty with Japan.

The Act of May 9, 1918, amending the Act of June 29, 1906, tends to support the view that § 2169 is only restrictive of Title XXX of which it is a part. No court, excepting Judge Lowell, *In re Halladjian*, 174 Fed. 834, has taken into consideration what that section plainly says.

Section 2169, if applicable to the Act of 1906, must be construed like the Act of March 26, 1790, and, so construed, "free white persons" means one not black, not a negro; which does not exclude Japanese.

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counterdistinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race.

"White person," as construed by this Court and by the state courts, means a person without negro blood. *United States v. Perryman*, 100 U. S. 235; *Dred Scott v. Sandford*, 19 How. 393, 420; *Du Val v. Johnson*, 39 Ark. 182, 192.

The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro.

The insertion by Congress of the word "free" in § 2169, in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to reenact the old section with the old meaning.

Giving the words "free white persons" their common and popular acceptance in 1875, no "uniform rule" can be laid down, based on color, race or locality of origin, and there is nothing in the laws of the United States, its treaties, in the history of the time, or the proceedings of Congress, to show that Japanese were intended to be excluded. Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion. America had

recently opened Japan to the western civilization, which Japan was gladly welcoming.

Judicial construction of the phrase, up to 1875, does not sustain such an exclusion. See *Dred Scott* and *Du Val Cases*, *supra*; *Lynch v. Clarke*, 1 Sandf. 583; *People v. Hall*, 4 Cal. 399; *People v. Elyea*, 14 Cal. 145. Cf. 2 Kent's Comm., p. 72.

No "uniform rule," applicable in all cases, can be drawn from the decisions since 1875. *Low Wah Suey v. Backus*, 225 U. S. 460; *In re Ah Yup*, 5 Sawy. 155; *In re Hong Yen Chang*, 84-Cal. 163; *In re Po*, 28 N. Y. S. 383; *In re Alverto*, 198 Fed. 688; *In re Mozumdar*, 207 Fed. 115; *In re Dow*, 213 Fed. 355; *Ex parte Shahid*, 205 Fed. 812; *In re Dow*, 226 Fed. 145; *United States v. Balsara*, 180 Fed. 694; *In re Camille*, 6 Fed. 256; *In re Mudarri*, 176 Fed. 465; *In re Saito*, 62 Fed. 126; *In re Kumagai*, 163 Fed. 922; *Bessho v. United States*, 178 Fed. 245; *In re Knight*, 171 Fed. 299; *In re Yamashita*, 30 Wash. 234; *In re Nian*, 6 Utah, 259; *In re Rodriguez*, 81 Fed. 337.

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolians. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in state and federal courts. In fact, the census of 1910 shows 209 American born citizens, 420 naturalized, and 389 with first papers, who are Japanese.

The words "free white persons," neither in their common and popular meaning, nor in their scientific defini-

tion, define a race or races, or prescribe a nativity or locus of origin. They deal with personalities and the qualities of personalities, and are only susceptible of meaning those persons fit for citizenship and of the kind admitted to citizenship by the policy of the United States. The words deal with individuals, not with races, nor with natives of any country or of any particular descent.

The word "free" is an essential part of the clause. Under the Constitution, it is used in opposition to slave. It imports a freeman, a superior, as against an inferior class.

"White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

"Person" is "a living human being; a man, woman or child; an individual of the human race." *United States v. Crook*, 25 Fed. Cas. 695. The provisions of the Fourteenth Amendment in reference to persons "are universal in the application to all persons within the territorial jurisdiction without regard to any difference of race, or color, or nationality." *Yick Wo v. Hopkins*, 118 U. S. 369. The same rule has been applied to include aliens under the Fifth and Sixth Amendments. *Wong Wing v. United States*, 163 U. S. 235.

No case has considered this point or given emphasis in the construction of the section to the words "free" and "persons," which are as important to the construction as the word "white." Nearly all think the section deals with races.

The question certified does not deal with individuals, but with a people, and the affirmative answer would exclude a Japanese who is "white" in color and is of the Caucasian type and race.

The Japanese are "free." They, or at least the dominant strains, are "white persons," speaking an Aryan tongue and having Caucasian root stocks; a superior class, fit for citizenship.

The Japanese are assimilable.

Congress in repeating without qualification the words "white persons" has left the subject in great uncertainty. All authorities without exception agree on dismissing the idea of white as a characteristic to be demonstrated by ocular inspection. If it is sought to interpret it as an ethnological term, authorities are so conflicting that it opens the way to serious inequalities of application. To apply the ambulatory definition which some of the learned judges have adopted, is to rob the law of all definiteness and to leave it to the whim of the particular judge or court. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the Act of 1870, and after that date, as having no practical significance. If this would run counter to the intention of Congress, that body can readily amend the act so as to make clear the legislative intention. But the subject certainly should not be left in the uncertain state in which it now is.

So far as the petitioners in the Yamashita case [*post*, 199,] are concerned, all that appears is that they were born in Japan and that they were duly naturalized by a state court in 1902. Every intendment of fact in favor of the jurisdiction therefore must be presumed. They may have been pure blooded Ainos, and as such "Caucasian" within the meaning of that term, as employed by most of the ethnologists and in a majority of the decisions construing the term "white persons" to mean those of the Caucasian race, so that in any event the judgment of the lower court must be reversed.

Mr. Solicitor General Beck, with whom *Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, was on the brief, for the United States.

The Act of June 29, 1906, is not complete in itself but is limited in its application to the eligible classes of persons mentioned in § 2169, Rev. Stats. At the time of the passage of the Act of 1906, through a uniform course of judicial construction of statutory language, continued in the law for over a century, it had become settled that Japanese and all other people not of the white or Caucasian race were not eligible for naturalization as "white persons." *In re Ah Yup*, 5 Sawy. 155; *In re Hong Yen Chang*, 84 Cal. 163; *In re Gee Hop*, 71 Fed. 274; *In re Po*, 28 N. Y. S. 383; *In re Nian*, 6 Utah, 259; *In re Camille*, 6 Fed. 256; *In re Burton*, 1 Alaska, 111; *In re Saito*, 62 Fed. 126.

The Act of 1906 did not extend the privilege of naturalization to any persons not theretofore eligible. Section 2169, Rev. Stats., was not repealed, and was specifically reaffirmed by the Act of May 9, 1918, c. 69, 40 Stat. 542, making special provision for the naturalization of Filipinos, Porto Ricans, and aliens who served in the military and naval forces of the United States. *Petition of Charr*, 273 Fed. 207, 210-212.

Since the passage of the Act of 1906, the courts without exception have continued to hold that § 2169 was still in force, its limitation still binding. *In re Alverto*, 198 Fed. 688; *In re Kumagai*, 163 Fed. 922; *In re Knight*, 171 Fed. 299; *In re Young*, 198 Fed. 715; *Bessho v. United States*, 178 Fed. 245; *United States v. Balsara*, 180 Fed. 694; *In re Yamashita*, 30 Wash. 234; *In re Dow*, 226 Fed. 145; *Petition of Charr*, 273 Fed. 207; *In re Halladjian*, 174 Fed. 834; *In re Bautista*, 245 Fed. 765; *In re Singh*, 257 Fed. 209; 246 Fed. 496; *In re Lampitoe*, 232 Fed. 382; *In re Mozumdar*, 207 Fed. 115.

So the ultimate question is, is the Japanese a white person, and it presents itself as a question of statutory

construction. In the first place it is said that we must give to these words the meaning which they had in the minds of the legislators of 1790, which is probably true; and that they were then used as a sort of "catchall" and meant all men except Negroes and Indians, which is surely untrue. It is undoubtedly true that the men of 1790 used the words as they understood them, and that their purview of possible and probable immigration comprised only Negroes and white men. But there is no warrant for believing that in their minds the whole human race consisted of black men, red men, and white men. To do so is to deny them the intelligence which they surely possessed. But on the other hand, to argue that they cast their eyes over the earth and considered the races thereof, and then, with deliberation, chose to exclude Chinese, Japanese, and the other yellow and brown peoples, is to give them credit for an imagination which they did not have. To ascertain their intent, it is not necessary to entangle one's common sense in a web of theory. The men who settled this country were white men from Europe and the men who fought the Revolutionary War, framed the Constitution and established the Government, were white men from Europe and their descendants. They were eager for more of their kind to come, and it was to men of their own kind that they held out the opportunity for citizenship in the new nation. It is quite probable that no member of the first Congress had ever seen a Chinese, Japanese or Malay, or knew much about them beyond the fact that they were people living in remote and almost inaccessible parts of the world having manners, customs and language which seemed strange, and unwilling to mingle with western people. Chinese immigration to this country did not begin until after the discovery of gold in California, and the census of 1870 was the first to report Japanese, 55 in number.

It is a matter of common knowledge that for many years Japan, and to a somewhat less degree, China, maintained a policy of isolation, and this policy continued from the middle of the seventeenth century until the Perry Expedition in 1853. American thought and statesmanship were directed toward Europe, not toward Asia. It was Europe and its "set of primary interests" with which Washington was concerned in his farewell address, and it was against interweaving our destiny with that of any part of Europe, or entangling our peace and prosperity in the toils of European ambitions that he warned his countrymen. It was European trade that was sought and, beyond doubt, European immigration which was desired and expected. Citizenship has always been deemed a choice possession, and it is not to be presumed that our fathers regarded it lightly, to be conferred promiscuously according to a "catchall" classification. It could only be obtained by those to whom it was given, and the men of 1790 gave it only to those whom they knew and regarded as worthy to share it with them, men of their own type, white men. This does not imply the drawing of any narrow or bigoted racial lines, but a broad classification inclusive of all commonly called white and exclusive of all not commonly so called. This has been the rule followed by the courts, and the cases already cited, many of which show exhaustive research and wealth of learning, leave very little to be said. A reading of the opinions of the judges who have written in these cases reveals impressive unanimity in one respect. Each person admitted, with the single exception of the Filipino (*In re Bautista, supra*, a special case), was admitted because he was deemed as matter of fact to be white; each person refused was refused because he was deemed as matter of fact not to be white. The ethnological discussions have covered a wide range of most interesting subjects, particularly in the border-line cases, the Syrian case (*In re*

Dow, 226 Fed. 145), and the Armenian case (*In re Halladjian*, 174 Fed. 834). But the present case can not be regarded as a doubtful case. The Japanese is not, and never has been, regarded as white or of the race of white people.

While the views of ethnologists have changed in details from time to time, it is safe to say that the classification of the Japanese as members of the yellow race is practically the unanimous view. Unless it could be demonstrated that the Japanese were of the white race, ethnological differences would be unimportant, even if otherwise relevant.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Frank English*, by leave of court, filed a brief as *amici curiae*.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant is a person of the Japanese race born in Japan. He applied, on October 16, 1914, to the United States District Court for the Territory of Hawaii to be admitted as a citizen of the United States. His petition was opposed by the United States District Attorney for the District of Hawaii. Including the period of his residence in Hawaii, appellant had continuously resided in the United States for twenty years. He was a graduate of the Berkeley, California, High School, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship is conceded.

The District Court of Hawaii, however, held that, having been born in Japan and being of the Japanese race,

he was not eligible to naturalization under § 2169 of the Revised Statutes, and denied the petition. Thereupon the appellant brought the cause to the Circuit Court of Appeals for the Ninth Circuit and that court has certified the following questions, upon which it desires to be instructed:

"1. Is the Act of June 29, 1906 (34 Stats. at Large, Part I, Page 596), providing 'for a uniform rule for the naturalization of aliens' complete in itself, or is it limited by Section 2169 of the Revised Statutes of the United States?

"2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the Naturalization laws?

"3. If said Act of June 29, 1906, is limited by said Section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?"

These questions for purposes of discussion may be briefly restated:

1. Is the Naturalization Act of June 29, 1906, limited by the provisions of § 2169 of the Revised Statutes of the United States?

2. If so limited, is the appellant eligible to naturalization under that section?

First. Section 2169 is found in Title XXX of the Revised Statutes, under the heading "Naturalization," and reads as follows:

"The provisions of this Title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

The Act of June 29, 1906, entitled "An Act To establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens

throughout the United States", consists of thirty-one sections and deals primarily with the subject of procedure. There is nothing in the circumstances leading up to or accompanying the passage of the act which suggests that any modification of § 2169, or of its application, was contemplated.

The report of the House Committee on Immigration and Naturalization, recommending its passage, contains this statement:

"It is the opinion of your committee that the frauds and crimes which have been committed in regard to naturalization have resulted more from the lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such cases. The two changes which the committee has recommended in the principles controlling in naturalization matters, and which are embodied in the bill submitted herewith are as follows: First. The requirement that before an alien can be naturalized he must be able to write either in his own language or in the English language, and read, speak, and understand the English language; and, Second. That the alien must intend to reside permanently in the United States before he shall be entitled to naturalization." House Report No. 1789, 59th Cong., 1st sess., p. 3.

This seems to make it quite clear that no change of the fundamental character here involved was in mind.

Section 26 of the act expressly repeals §§ 2165, 2167, 2168, 2173 of Title XXX, the subject-matter thereof being covered by new provisions. The sections of Title XXX remaining without repeal are: Section 2166, relating to honorably discharged soldiers; § 2169, now under consideration; § 2170, requiring five years' residence prior to admission; § 2171, forbidding the admission of alien enemies; § 2172, relating to the status of children of naturalized persons, and § 2174, making special provision in respect of the naturalization of seamen.

There is nothing in § 2169 which is repugnant to anything in the Act of 1906. Both may stand and be given effect. It is clear, therefore, that there is no repeal by implication.

But it is insisted by appellant that § 2169, by its terms is made applicable only to the provisions of Title XXX and that it will not admit of being construed as a restriction upon the Act of 1906. Since § 2169, it is in effect argued, declares that "the provisions of *this Title* shall apply to aliens, being free white persons . . .," it should be confined to the classes provided for in the unrepealed sections of that title, leaving the Act of 1906 to govern in respect of all other aliens, without any restriction except such as may be imposed by that act itself.

It is contended that thus construed the Act of 1906 confers the privilege of naturalization without limitation as to race, since the general introductory words of § 4 are: "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." But, obviously, this clause does not relate to the subject of eligibility but to the "manner," that is the procedure, to be followed. Exactly the same words are used to introduce the similar provisions contained in § 2165 of the Revised Statutes. In 1790 the first Naturalization Act provided that, "Any alien, *being a free white person*, . . . may be admitted to become a citizen, . . ." C. 3, 1 Stat. 103. This was subsequently enlarged to include aliens of African nativity and persons of African descent. These provisions were restated in the Revised Statutes, so that § 2165 included only the procedural portion, while the substantive parts were carried into a separate section (2169) and the words "An alien" substituted for the words "Any alien."

In all of the Naturalization Acts from 1790 to 1906 the privilege of naturalization was confined to white persons

(with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress in 1906 desired to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.

The argument that because § 2169 is in terms made applicable only to the title in which it is found, it should now be confined to the unrepealed sections of that title is not convincing. The persons entitled to naturalization under these unrepealed sections include only honorably discharged soldiers and seamen who have served three years on board an American vessel, both of whom were entitled from the beginning to admission on more generous terms than were accorded to other aliens. It is not conceivable that Congress would deliberately have allowed the racial limitation to continue as to soldiers and seamen to whom the statute had accorded an especially favored status, and have removed it as to all other aliens. Such a construction can not be adopted unless it be unavoidable.

The division of the Revised Statutes into titles and chapters is chiefly a matter of convenience, and reference to a given title or chapter is simply a ready method of identifying the particular provisions which are meant. The provisions of Title XXX affected by the limitation of § 2169, originally embraced the whole subject of naturalization of aliens. The generality of the words in § 2165, "An alien may be admitted . . ." was restricted by § 2169 in common with the other provisions of the title. The words "this Title" were used for the purpose of identifying that provision (and others), but it was the provision which was restricted. That provision having been amended and carried into the Act of 1906, § 2169 being left intact and unrepealed, it will require some-

thing more persuasive than a narrowly literal reading of the identifying words "this Title" to justify the conclusion that Congress intended the restriction to be no longer applicable to the provision.

It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church v. United States*, 143 U. S. 457; *Heydenfeldt v. Daney Gold Mining Co.*, 93 U. S. 634, 638. We are asked to conclude that Congress, without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words of § 2169, which section we may assume was continued for some serious purpose, has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion. We are, therefore, constrained to hold that the Act of 1906 is limited by the provisions of § 2169 of the Revised Statutes.

Second. This brings us to inquire whether, under § 2169, the appellant is eligible to naturalization. The language of the naturalization laws from 1790 to 1870 had been uniformly such as to deny the privilege of

naturalization to an alien unless he came within the description "free white person." By § 7 of the Act of July 14, 1870, c. 254, 16 Stat. 254, 256, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." Section 2169 of the Revised Statutes, as already pointed out, restricts the privilege to the same classes of persons, viz: "to aliens [being free white persons, and to aliens] of African nativity and persons of African descent." It is true that in the first edition of the Revised Statutes of 1873 the words in brackets, "being free white persons, and to aliens" were omitted, but this was clearly an error of the compilers and was corrected by the subsequent legislation of 1875 (c. 80, 18 Stat. 316, 318). Is appellant, therefore, a "free white person," within the meaning of that phrase as found in the statute?

On behalf of the appellant it is urged that we should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians then inhabiting this country. It may be true that these two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges. As said by Chief Justice Marshall in *Dartmouth College*

v. *Woodward*, 4 Wheat. 518, 644, in deciding a question of constitutional construction: "It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation "white" were Negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be Negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.

The question then is, Who are comprehended within the phrase "free white persons?" Undoubtedly the word "free" was originally used in recognition of the fact that slavery then existed and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

We have been furnished with elaborate briefs in which the meaning of the words "white person" is discussed

with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, in *In re Ah Yup*, 5 Sawy. 155 (1878), the federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race. Among these decisions, see for example: *In re Camille*, 6 Fed. 256; *In re Saito*, 62 Fed. 126; *In re Nian*, 6 Utah, 259; *In re Kumagai*, 163 Fed. 922; *In re Yamashita*, 30 Wash. 234, 237; *In re Ellis*, 179 Fed. 1002; *In re Mozumdar*, 207 Fed. 115, 117; *In re Singh*, 257 Fed. 209, 211-212; and *Petition of Charr*, 273 Fed. 207. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested. *United States v. Midwest Oil Co.*, 236 U. S. 459, 472.

The determination that the words "white person" are synonymous with the words "a person of the Caucasian race" simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words "white person" mean a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection (*Davidson v. New Orleans*, 96 U. S. 97, 104) "the gradual process of judicial inclusion and exclusion."

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.

The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

The questions submitted are, therefore, answered as follows:

Question No. 1. The Act of June 29, 1906, is not complete in itself but is limited by § 2169 of the Revised Statutes of the United States.

Question No. 2. No.

Question No. 3. No.

It will be so certified.